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No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT B. SUTTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented to this Honorable Court for review are whether:

I. Did the opinions below deny the Petitioner his constitutional right to confront and examine before the jury witnesses against him (Jean Brown and Jack Clothier) for bias, interest, motive and prejudice when the trial judge prevented confrontation of these witnesses with a Texas State court indictment pending against them?

II. Did the opinions below allow the government to introduce a "box" of contested hearsay documents without any proper foundation, identification or authentication and deny petitioner his right to confront the evidence in his first trial in which he was convicted on one count, where the Government exhibit was not shown to any witness who had control of it, nor any custodian of the records and the Government failed to call key witnesses who had possession of these documents for over one year?

III. Did the trial court in preventing the defendant from informing the jury that he was acquitted of other crimes in the indictment, evidence of which was introduced at both trials and argued to the jury as motive and intent on the remaining counts emasculated the defendant's constitutional protections of collateral estoppel, double jeopardy, confrontation, due process and a fair and impartial jury?

IV. Did the opinions below allow a double standard to be applied in the granting of challenges for cause in the jury selection process, thus increasing the government's pre-emptory

challenges and impairing Defendant's right to his unrestricted right, his pre-emptory challenges, when the trial judge automatically excused for cause jurors with knowledge of the Defendant's prior acquittals, but applied a stricter requirement for jurors with adverse knowledge of Defendant?

V. The opinions below fail to apply the independent evidence test for introduction of co-conspirator statements when the only other independent evidence negated the intent of the only other alleged co-conspirator in violation of petitioner's right to confrontation?

LIST OF INTERESTED PARTIES

Pursuant to Rule 21.1(b) of the Rules of this Honorable Court, Petitioner states that he is the only interested party within the contemplation of the above cited rule.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

The Petitioner, Robert B. Sutton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the case on April 23, 1984.

OPINIONS BELOW

The Tenth Circuit Court of Appeals upheld Petitioner's conviction by opinion dated April 23, 1984. A copy of that opinion is marked "Appendix A" and annexed hereto. On June 4, 1984 the Tenth Circuit denied a timely filed petition for rehearing by a Per Curiam judgment which assigned no written reason therefor. A copy of that Per Curiam is marked "Appendix B" and annexed hereto.

The trial court issued no opinion upon the conviction of the Defendant (United States District Court for the Northern District of Oklahoma, Honorable Judge James O. Ellison, presiding).

STATEMENT OF JURISDICTION OF COURT

Pursuant to 28 USC 1254, appellant seeks to have this Court grant his Petition for Writ of Certiorari and review the decision of the United States Court of Appeals for the Tenth Circuit rendered on April 23, 1984. The decision of the Tenth Circuit became final upon the denial of that Court of a timely filed petition for rehearing June 4, 1984. The jurisdiction of the Circuit Court was based on 28 USC 1291. The Defendant was convicted of Count XVII of the indictment on May 27, 1982 and of Count XVI June 22, 1982. The District Court had original trial jurisdiction of this case pursuant to 18 USC Sec. 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provision which will be the

subject of interpretation in this case is the Sixth Amendment to the United States Constitution which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Sutton, along with two corporations, B.P.M., Ltd. and Scurry Oil Company, was indicted on October 29, 1981, and charged as follows:

1. Sutton, B.P.M., Ltd., and Scurry Oil Company—Counts I-III, 3 violations of Title 18 USC 1961 et seq. (R.I.C.O.)
2. Sutton, B.P.M., Ltd., and Scurry Oil Company—Counts IV-XI, 8 violations of Title 18 USC 1341 (Mail Fraud)
3. Sutton, B.P.M., Ltd., and Scurry Oil Company—Counts XII-XV, 4 violations of Title 18 USC 1343 (Wire Fraud)
4. Sutton—Count XVI, violation of Title USC 1505 (Obstruction of Justice)
5. Sutton—Count XVII, violation of Title 18 USC 371 (Conspiracy to Obstruct Justice)

The principal charges of the indictment concerned allegations that the Petitioner had committed mail and wire fraud

and thereby violated the R.I.C.O. statutes (18 USC 1961 et seq.). The alleged predicate offenses for the R.I.C.O. counts were the mail and wire fraud counts contained in Counts IV through XV.

Count XVI charged a violation of 18 USC 1505 as a result of an alleged phone call by the Defendant, Sutton, to a Mr. Gaylord Simon on December 19, 1978, in which Sutton allegedly counseled, advised and suggested that Simon destroy and conceal certain records of B.P.M.'s crude oil sales and purchases, which were being sought by the Department of Energy in connection with Department of Energy proceedings.

Count XVII charged that Sutton conspired, with persons known and unknown, to obstruct justice by preventing Jack D. Clothier and William H. Lambert from communicating information relative to criminal violations to the F.B.I. and Department of Justice by means of misrepresentation, intimidation, force and threats.

Prior to trial the Defendants filed a motion for a pre-trial hearing regarding co-conspirator statements. The Court granted Defendants' request for a pre-trial "James-Peterson-Stipe" hearing to determine whether the Government had sufficient independent evidence of the conspiracy as alleged in Count XVII to permit the introduction and receipt of co-conspirator's statements at trial and also to determine whether an abuse of the grand jury process had occurred. These hearings were conducted April 1, 2, 5 and 6 of 1982, prior to the commencement of trial on April 20, 1982. After hearing the evidence, the Court ruled that there was a conspiracy between Sutton and Carlos Marcello but not with any other alleged persons. (Pre-trial Hearing on April 6, 1982.)

The Government presented its evidence at trial commencing on April 20, 1982, and concluded its presentation on May 12, 1982. Thereupon, the Defendants, under Rule 29(a) of the Federal Rules of Criminal Procedure, moved for judgment of acquittal. The trial court, on May 13, 1982, entered a Judgment of Acquittal in favor of all Defendants on Counts I through XV but declined to do so on Counts XVI and XVII which involved only Sutton. (TR. I 3141-3144) The Government sought review on an emergency basis in the Tenth Circuit. A divided panel of the Court of Appeals, on May 20, 1982, set aside the District Court's Judgment of Acquittal and directed that all counts of the Indictment be submitted to the jury. Immediately thereafter the Court of Appeal sitting *En Banc* reversed the decision of the panel.

At the recommencement of the trial on May 25, 1982 the trial court instructed the reconvened jury that Counts I through XV of the Indictment had "been otherwise disposed of" and further instructed the jury that they should not consider these charges or speculate in any way as to how the charges were disposed of. The Court further advised the jury that they were to consider only the charges contained in Counts XVI and XVII and "the evidence introduced as it pertains to those charges" without defining or indicating what evidence was to be considered by the jury. (TR I 3226) Thereafter, following two days of deliberation by the jury a verdict of guilty was returned as to Count XVII with the jury being unable to agree on a verdict as to Count XVI.

Thereafter, the re-trial of the appellant on Count XVI was commenced on June 14, 1982 after the Court denied a continuance motion by the Defendant. In the selection of the jury for the re-trial of Count XVI, the Defense moved for a mis-

trial on the basis of the Court's dismissal of jurors who indicated an awareness or knowledge of the disposition by the Trial Court of Counts I through XV of the Indictment, when challenged for cause by the Government, without making further inquiry as to whether with such knowledge the jurors could sit fairly and impartially in judgment of the case, while allowing jurors with confused or adverse information about the Defendant to remain on the panel when challenged for cause by the Defendant. The Petitioner was restricted from introducing any evidence of the disposition of Counts I through XV or his acquittal of the charges of fraud as therein set forth even when he testified at the second trial. The jury returned a verdict of guilty on June 22, 1982.

Judgment was entered on July 1, 1982, and Sutton was sentenced to five (5) years imprisonment of each of Counts XVI and XVII, the sentences to run concurrently.

B. Statement of Facts

1. The First Trial

On June 30, 1978, the Department of Energy (DOE) served a subpoena on a "James Blakely," a Sutton employee (Government 41) which directed Sutton, as president of B.P.M., to produce certain crude oil sales and purchase records by July 10, 1978. (TR I 2509, 2510) No evidence of further enforcement or other proceeding by DOE was introduced. (TR I 1508-2511)

In the summer of 1978, Sutton had purchased a refinery company in Louisiana called Inger Oil Company (Inger). Miss Jean Brown operated both Scurry and Inger for Sutton

until she left sometime in October of 1978. At the time she left, Miss Brown formed her own companies, Creek Terminals and Creek Development, to build an oil reclamation plant close to the Inger refinery. To purchase the land, she used a check she wrote on Inger's account. She had been introtroduced to the other principals in this company by Jack Clothier. Much of the equipment at Inger disappeared and some of it ended up at the Creek Terminal site, provoking a confrontation between Sutton and Jean Brown. (TR I 737, 742, 743-784, 812-817, 2641-2642)

In the fall of 1978, Sutton had most of his records relating to B.P.M., Scurry Oil, Inger and other companies taken to Lafayette, Louisiana to be stored for use by his attorney, Charles Wooten. (TR I 2573) Wooten had retained the services of an accountant, William Johnson, (TR I 2528) to work on the records of B.P.M., Scurry Oil, Inger and other companies to assist him in his representation of Petitioner and his companies. Johnson had various records of Petitioner including B.P.M. and Inger records at his office to work with. (TR I 2532-2534)

Gaylord Sutton was an employee of Sutton at Lafayette, Louisiana who had been hired by Jean Brown to help run Inger. (TR I 2572) Simon testified at trial that he was called by Bob Noland, a B.P.M. employee, and was told to go pick up a box of records at Johnson's office on December 19, 1978. (TR I 2580) He stated that he picked up a box of records and went to LaFonda's Restaurant in Lafayette, Louisiana where he called Petitioner Sutton at the office of Paul McBride, Sutton's attorney at that time. (TR I 2588-2589) Phone records were introduced to show a call from

LaFonda's on December 19, 1978, to the law office of Paul McBride in Tulsa, Oklahoma at 12:01 P.M. Simon testified that Sutton told him on the phone to destroy the box of records that he had, and that he never wanted to talk to him again about it. (TR I 2583)

Simon also testified on cross-examination that on December 19, 1978, he also had a box of Inger records in his possession, which he had gotten from Johnson's office and which he was working on that day with an attorney from Wooten's office. He admitted it was possible that he called Sutton's attorney, Mr. McBride, that day to talk about the deposition in New Orleans set for the next day at which he was to produce Inger records. He also admitted that he had driven to New Orleans that night (the 19th of December) so that he would be there the next morning for the deposition at which he produced the box of Inger records. (TR I 2516-2625)

Simon testified that he never destroyed the box of records he had, but kept them in his closet at home. (TR I 2583) Simon continued to work for Sutton until May of 1979, when he moved to the Houston, Texas area. He testified that he was never contacted by anyone from B.P.M. or Sutton to ask what he had done with the records or whether, in fact, he had destroyed them. (TR I 2626)

Simon further testified that in June of 1979, he gave the box he had to Jack Clothier, a former business associate of Mr. Sutton in Scurry Oil. (TR I 2583) He also stated that in May and June of 1979, Jack Clothier gave him two $10,000.00 checks which he called a loan. (TR I 2627-2628)

Jack Clothier was trading oil in the Houston, Texas area in the Fall of 1979, and doing business with Jean Brown and Simon. At a hotel in Longview, Texas in December of 1979, he offered Jean Brown a part of a blackmail deal against Sutton to blackmail him for records he had obtained. (TR I 766, 767, 2630)

Both Clothier and Jean Brown were indicted by the State of Texas for criminal activity together involving theft of oil which occurred during this period of time, but the trial court would not allow cross-examination of Jean Brown regarding these charges and ruled that no other witnesses could be cross examined about the Texas State Court Indictment in the trial including Jack Clothier. (TR I 708-725)

In January of 1980, the federal prosecutor investigating B.P.M. for DOE violations, Mr. Fishkin, was notified by letter by Sutton's attorneys that Mr. Jack Clothier and his attorney, Mr. William Lambert, who also purported to represent Mr. Simon and Miss Jean Brown, seemed to be in possession of certain records of Sutton's about which they were making thinly veiled blackmail demands upon Mr. Sutton. Mr. Fishkin subpoenaed Mr. Clothier to the Grand Jury in Oklahoma City for February 7, 1980.

On January 24, 1980, Sutton, who had received extortion demands from Jack Clothier for $5,000,000.00, called a Carlos Marcello in New Orleans, Louisiana. Mr. Sutton told him that he was being blackmailed and wanted to talk about it. (Government Exhibit 51 and 52, TR I 2815) Carlos Marcello's phone and office were "tapped" as a result of the "Bri-Lab" investigation.

On January 29, 1980, Mr. Sutton came to the office of Carlos Marcello and told him that he was was being blackmailed and wanted Mr. Marcello's assistance. He stated that Jack Clothier and William Lambert had talked to the F.B.I. and were going to talk to them again on the following Monday. He told Marcello that his lawyers had told the F.B.I. about the blackmail and they hadn't done anything. He said that he wanted Jack Clothier arrested and put in jail on a pending warrant and Lambert picked up and put in jail for D.W.I. Marcello replied that he would check on them. (Government Exhibit 51 and 52) (TR I 2817) (Pre-trial Exhibit 8, April 2, Pg. 83)

On February 1, 1980, Marcello met with Barry Mouton, his lawyer, and told him of Sutton's blackmail problems. He said he wasn't going to do anything for him. He said he had just listened. He had earlier called Mouton on January 30, 1980, and asked if he knew anything about Lambert or Clothier. (April 2, Pre-trial Motion, Exhibit 10, Pg. 84) (All Mouton recordings were not introduced at trial having been suppressed by the trial court.) He also told Mouton that Sutton had a lot of money and indicated that perhaps there could be a way that they could get some of it. (April 2, Pre-trial Motion, Exhibit 12, Pg. 89)

The same afternoon, Marcello was visited by Robert Noland, an employee of Sutton's who did his crude oil trading. With Noland was a Mr. Dick Williams who was described by Marcello as "his man." Mr. Noland told Marcello that he wanted Marcello to try and convince Sutton to turn over the operation of his companies to Noland and Williams, because he, Noland, wanted to take over. Marcello agreed to do this,

but said he would have to get "closer" to Sutton. Marcello told Noland and Williams that he had talked to Sutton and would not get involved with him in his problems with the F.B.I. (TR I 2850)

On February 6, 1980, Marcello, in a phone call with Mouton, told him that he wanted to get Mouton together with Sutton so Mouton (his friend) could get a fat legal fee. (April 2, Pre-trial Motion, Exhibit 18, Pg. 91 & 92)

Despite the fact that the F.B.I. monitored all of Marcello's phone and office conversations during this time and afterwards, no other evidence was ever produced to show that Marcello did or said anything to indicate he intended to or was assisting Sutton to obstruct justice. No evidence was received which showed anyone interfered in any way with Clothier or Lambert in their relations with the F.B.I. at any time, despite the fact that the Defendant was not aware that these conversations had been surreptitiously recorded until after the indictment had been returned in October of 1981.

When Clothier appeared at the Grand Jury on February 7, 1981, he did not produce any box. Both he and Lambert told the Government prosecutor that Simon had some records. They said that Simon was nervous and would be uncooperative, but that they would go talk to him and try and get him to turn over the box of records he had. The Government attorney acceded to this and Clothier and Lambert returned to Louisiana. (TR I 2672-2735)

Later, the Government attorney issued a subpoena to Simon for the box of records. F.B.I. Agent Blount scratched out the name of Simon and wrote in Lambert and picked up

a box of records from Mr. Lambert which was introduced through Mr. Blount as Government Exhibit 53. (TR I 2857-2864) No other witness called by the Government to that point had ever been shown Government Exhibit 53.

Simon testified in Trial that he had not seen the box since he had given it to Clothier in 1979.

Neither Clothier nor Lambert was called by the Government at trial but Mr. Fishkin admitted that Clothier had been brought back to a later Grand Jury and allowed to change his testimony about the box of records he had possessed, because either he or Simon had lied to the Grand Jury about it. (TR I 2672-2735)

2. The Second Trial

At the second trial involving only Count XVI, no evidence was presented as to the conspiracy allegation with regard to Count XVII.

At this trial Miss Brown again testified about preparing a box of records which was sent to Louisiana and about comments Sutton had made about burning his records before turning them over to the authorities. But in this trial she was shown Government Exhibit 53 for identification purposes. She again admitted Clothier had asked her to participate in a blackmail scheme against Sutton.

The Government was also allowed to introduce evidence alleging miscertification of oil by the Defendant and, in fact, argued that this was a "violation of the law," in spite of the Defendant's prior acquittals. The Defense was prohibited from

proving that Sutton and B.P.M. and Scurry Oil had been acquitted of these allegations in the first trial even when Robert Sutton testified in this trial and was cross examined about these prior crimes.

Gaylord Simon was again called and testified to the phone call in which he had allegedly been told to destroy the box of records he had picked up from William Johnson. He was shown Government Exhibit 53 but could not identify this as the box he had received from Johnson. He testified the box he had possessed had B.P.M. written on its sides. (TR II 716-791) Government's Exhibit 53 had no such markings.

The Government also called Jack Clothier in this trial, who identified Government Exhibit 53 as the box he had gotten from Simon. He denied having asked Jean Brown to participate in a blackmail scheme in direct contradiction to her testimony. (TR II 1023-1056)

The Defendant Sutton was called in this trial and testified that he never told Simon to destroy any records. (TR II 1109-1112)

In the second trial the defense did not confront either Jean Brown nor Jack Clothier with their Texas State Court indictments because of the prior rulings by the trial court.

ARGUMENTS OR REASONS FOR GRANTING THE WRIT

There are several compelling reasons why this Honorable Court should issue a Writ of Certiorari in this case (all of which are within the purview of Rule 17). These reasons coin-

cide with the "Questions Presented for Review" found in this petition and are numbered similarly. The opinions below (particularly the Tenth Circuit Court of Appeals decision) completely failed to respond to the constitutional considerations raised by the Petitioner. To leave the Tenth Circuit decision in this case standing intact will put that Circuit in the position of holding contrary to the other Circuits, contrary to the authorities of the Honorable Court and contrary to its own opinions, and results in the denial of Defendant's basic constitutional rights and a fair trial as set out in each of the following sections.

I. THE OPINIONS BELOW DENY THE PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONT AND EXAMINE BEFORE THE JURY WITNESS AGAINST HIM (JEAN BROWN AND JACK CLOTHIER) FOR BIAS, INTEREST AND PREJUDICE AGAINST PETITIONER.

The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . ." The right to confront and examine for bias, prejudice and interest could not be more basic to our criminal justice system. As *Davis v. Alaska*, 94 S.Ct. 1105 (1979) plainly dictates, it is not a right without a remedy.

> "Petitioner was denied the right of effective cross examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1,3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314. *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968)." *Davis*, supra at 1111.

It is the **jury** who must be allowed to judge the response of the witness when directly confronted with **evidence** of bias, interest and prejudice, allowing the jury to draw inferences of bias motive and interest, even where denied by the witness. It is clear from Jean Brown's sworn testimony in a federal grand jury proceeding, that she blames the Defendant for the "charges" (state racketeering charges) pending against her and "Jack Clothier" in Texas (TR I 711)[1] Scurry Oil Company was a Sutton-owned company in which both Jean Brown and Jack Clothier allegedly claimed an interest. In her Grand Jury Testimony, Ms. Brown is obviously stating that **Bob Sutton** and his company, Scurry Oil (co-defendant in this case), were responsible for the criminal acts **she** was charged with in Texas and that she and her associates, with whom she was indicted (including Jack Clothier), didn't know anything about it. Clearly this demonstrates that she asserted that "they" (Robert Sutton and his company, Scurry Oil) got her "mixed up" in it, and that neither she nor Jack Clothier knew anything about it. In effect, her defense to those charges was to "dump" on Bob Sutton, and in connection therewith, protect Jack Clothier. The State Court indictment was obviously relevant to the issue of additional Goverment witnesses' motives to lie,

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[1] MR. LANSDEN: I think it tore out. Here it is starting on page 45 at the bottom of the page.

"Question: Did something happen to Scurry Oil after you left working for Bob Sutton that you heard about?

"Answer: Yes, sir, they went down, they were buying oil inadvertently they claimed got me mixed up with it and it just isn't true. I didn't even know they were hauling oil out of east Texas and turning it in to barge down at Aransas Pass and selling it for crude being purchased in west Texas. West Texas crude is practically all very sour. East Texas crude is all sweet. Then they were carting it around and taking it into Mr. Sutton. He was selling it to somebody else or taking it into his refinery.

"Question: What happened, how did you hear about that?

"Answer: Well, I got indicted along with a bunch of other people that don't know anything about it going back to . . . ."

That's the portion I refer to the Court.

in this case, to protect each other and gain favor with the Government.[2]

The Lower Court decision ignores the fact that the trial Court's ruling prohibited this confrontation in the second trial with both Jean Brown and Jack Clothier. Throughout the first trial, defense counsel repeatedly argued to the Court that the Court's ruling would prevent them from examining the bias, prejudice and interest of witnesses other than Jean Brown. The Court requested the names of specific witnesses

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[2] Obviously, from the face of the Indictment, (Defendant Exhibit 3 & 4), Jean Brown and Jack Clothier had a motive to protect each other's interest. Jean Brown's attempts to do so are apparent from the shading of her admission to the F.B.I. that Clothier had offered her a part of a blackmail deal against Sutton, testifying she didn't believe Clothier was serious. (TR 771) She also denied having any further business dealings with Clothier after she left Sutton's employment in the fall of 1978. (TR 766) However, the scope and particular allegations in the Texas Indictment gave a backdrop for most of these witnesses' actions during the time frame of Counts 16 and 17 of this case.

First, they show a continuing pattern of criminal conduct between these individuals during a period from the summer of 1979, through at least February of 1980. Second, they show a continued pattern of operation under the name "Creek Terminals," which cross examinations of Jean Brown established was set up with the use of Defendant's money through Inger Oil Company, most of whose records had been **vandalized in Crowley by unknown persons.** (TR 742-784, 2576-2578, 2533) Third, the Indictment shows the involvement of John Rakestraw with Jean Brown at page 3, paragraph 7, of defense Exhibit 4. Rakestraw had received forty thousand dollars from Jean Brown shortly after she left Inger Oil and around the same time that the "Inger" records were vandalized in Crowley. (TR I 578-762) Fourth, Gaylord Simon admitted giving a box of records to Jack Clothier in the Houston area in the summer of 1979 and receiving twenty thousand dollars from Clothier and getting in the oil business in that area of Texas and dealing with Clothier in the oil business thereafter. (TR I 2591-2621) Finally, Jean Brown admitted that Clothier told her about the blackmail scheme at a place and time that coincides with paragraph 2 on page 7 of defense Exhibit 4 (TR I 766-769), yet she was very evasive as to whom Clothier got the records from and whether or not he paid Simon for them.

Jean Brown and Clothier were originally set to be tried **before** Sutton on these state charges, yet the case was continued evidently after some contact and agreement was made with State authorities by the United States Attorney's Office (June 10th, Hearing on Motion, Page 6). Assistant United States Attorney Swartz made the statement that two lawyers who were subpoenaed witnesses in the Sutton trial would be representing Clothier and Brown in the Texas State Court proceedings, presumably William Lambert and Paul McBride. **Jack Clothier has yet to be tried on these charges.**

for the record. (TR I 710) Defense counsel responded that they should be entitled to ask Jack Clothier whether he blamed the Defendant for Texas charges pending against him, or whether the fact that he was charged with Jean Brown would motivate him to protect her as well as himself by blaming the Defendant. (TR I 696, 985) Defense counsel urged this again to be sure that the extension of this ruling would be preserved for appeal. (TR I 987)

At both trials, defense counsel desired to ask Jean Brown and Jack Clothier about the Texas charges and whether they received, expected to receive or had hopes of receiving assistance from the United States Government or the Texas authorities as a result of the federal and/or state charges, or whether these charges gave them motive to protect each other and whether Sutton's conviction would benefit them. Both witnesses denied such inducements. In the first trial the Trial Court ruled that defense counsel could only ask whether they had been promised "help by the Government" without examining further the nature of the charges they might expect help with, and what were the nature of those charges. (TR I 689, 691, 708) Therefore, defense counsel was not allowed to examine, in front of the jury, for "what" she blamed the Defendant, or infer **why these charges** gave her motivation to protect other witnesses in this case, or how a conviction in this case of Sutton would assist them in their Texas case defense. If the jury is unaware of exactly what, or how much trouble the witness thinks the Defendant caused her, and how the specific charges would motivate the witness to be biased, how can the jury decide just what and how much motivation the witness would have to be biased and prejudiced against the Defendant? In this particular situation, the balancing of interests between the Defendant's constitutional right to confront

admitted **and sworn bias**, interest and prejudice against him and on the other hand, the protection against revealing other acts or conduct of the Government witness, must be resolved in the Defendant's favor. *Davis v. Alaska*, supra, *U.S. v. Mayer*, 556 F.2d 2145 (5th Cir. 1977), *United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978), *United States v. Groucher*, 532 F.2d 1042 (5th Cir. 1976).

Since the Court's ruling extended not only to the cross examination of Jean Brown, but also to Jack Clothier, (TR I 696, 708, 1454), counsel was prevented from confronting him with this issue at the subsequent retrial of Count XV when he testified. (See *Abzill v. Pogue*, 534 F.2d, 195 (9th Cir. 1976).

II. THE OPINIONS BELOW ALLOWED THE GOVERNMENT TO INTRODUCE A "BOX" OF CONTESTED DOCUMENTS WITHOUT ANY FOUNDATION, IDENTIFICATION OR AUTHENTICATION AND DENIES PETITIONER HIS RIGHT TO CONFRONT THE EVIDENCE AND WITNESSES AGAINST HIM.

The Court's decision seemingly sets a new rule in the Tenth Circuit as well as all the other Circuits for the introduction of contested evidence (or a box of contested evidence). Not one person identified the papers therein as records of B.P.M.; no custodian was called. F.B.I. Agent Blount testified near the completion of the Government's case that this was "a" box of records received from William Lambert. F.B.I. Agent Brechwald testified that he examined the records in the box, purely from a scheduling point of view as an accountant, but that he didn't know what, or whose records they were. NOT ONE witness with knowledge of the box was even

shown the box in court. Jack Clothier and William Lambert, who controlled the "box" for almost a year, were not called by the Government to testify at the first trial. The Government simply was allowed at the end of the Government's case to have Agent Blount testify that he picked up the "box" from Lambert, and the box was admitted. Thereafter, Agent Brechwald was then allowed to testify that he prepared schedules from them. Not one person identified the box as containing B.P.M. records. The **real** issue here is CONFRONTATION! It is no accident that every person who would have had to be called by the Government to prove chain of custody or to identify or authenticate the evidence, or that every person who had possession of the box and thus an opportunity for alteration or blackmail, was involved with each other in a scheme to defraud the Defendant and thus guilty of criminal conduct themselves. Yet the Defendant had no opportunity to question **anyone** as to what they knew about the Government Exhibit 53, or its relation to the Defendant. Every one of the persons who had possession of the records had a reason to lie about why or what records he had. The Defendant's denial of confrontation was aggravated by the rebuttal argument of the Government. They did not argue that they might be, they argued that they were "the" records (TR I 3325). It is the motive and involvement of the persons who would have had to have been called by the Government to lay the foundation for identification and then authenticate the box that elevates this issue from one of mere evidentiary discretion to a question of constitutionally required confrontation. See *Davis v. Alaska*, supra at 110; *Ohio v. Roberts*, 100 S.Ct. 253 at 1537 (1980); *Green v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413; 3 L.Ed.2d 1377 (1959).

The Government, in its final arguments, and the Court, on the record, contended that the contents of the box was relevant to **both** Counts XVI and XVII. In response to defense counsel's objections to the jury delving into the box during its deliberations, the trial judge stated, as additional grounds for denial, ". . . that the position of the Government, and I think it's well founded, that the contents of the box would indicate the possibility of motive or intent in connection with the remaining **Counts XVI and XVII.**" (TR I 3390) (Emphasis added.) Hence the introduction of the box as evidence is, in addition to a denial of the Defendant's right to confrontation, an erroneous introduction of highly prejudicial evidence used in a destructive manner and not merely harmless error, as it related to his conviction on Counts XVI and XVII in the first trial. The key issues of confrontation are that the Government intentionally, by its strategy, denied Defendant confrontation on the issues surrounding the "box," and moreover denied the Defendant's right to confront the **hearsay** context of those records in the box; in contravention of Federal Rule of Evidence 803 (6). The Government then argued the contents of those hearsay records to the jury for the truthfulness of the hearsay information contained therein.

III. PREVENTING THE DEFENDANT FROM INFORMING THE JURY THAT HE WAS ACQUITTED OF OTHER CRIMES, EVIDENCE OF WHICH WAS INTRODUCED AT BOTH TRIALS AND ARGUED TO THE JURY, EMASCULATED THE DEFENDANT'S CONSTITUTIONAL PROTECTIONS OF COLLATERAL ESTOPPEL, DOUBLE JEOPARDY, CONFRONTATION, DUE PROCESS AND A FAIR AND IMPARTIAL JURY.

The Government can strike hard blows, but not foul

ones, *Berger v. U.S.*, 295 U.S. 78 (1978). The Court of Appeal's decision allows the Government to do just that. At the first trial after the Defendant's acquittal by the trial court on a motion for a Judgment of Acquittal (which was affirmed by this Circuit, sitting *en banc*) the court informed the jury that counts I-XV had been "otherwise disposed of." The Defendant requested a severance and/or a mistrial of Counts XVI and XVII and further argued that since the Government had the opportunity to prove what was now "other crimes" of the Defendant, the Defendant should be allowed at trial to assert the acquittal. The trial court prohibited the Defendant from doing so and the Court of Appeal's decision fails to even address this issue as it arose in the second trial.

At the second trial on Count XV the Government was again allowed to introduce evidence of counts I-XV to prove motive of the Defendant under authority of F.R.E., 404 (b), despite its inherently prejudicial effect. Again, defense counsel was prevented from informing the jury of the judgment of acquittal in order to rebutt motive. When the Defendant took the stand at the second trial, the Government was allowed to confront the Defendant with evidence of these other crimes and cross-examine him thereon to prove motive. Yet, despite the fact that the Government made the decision to open this door, the Defendant was prohibited from telling the jury that he had been acquitted in that same court of committing those acts in an attempt to rebutt motive. The trial court specifically and emphatically warned the Government not to mention the other crimes in closing at both trials (TR I 3221) (TR II 1210) with which the government agreed (TR II 1210). Yet the prosecutor, Hardy, minutes later stood in front of the jury and argued:

> "And I suggest to you that the evidence that the Government presented proves that the reason that he didn't want the Energy Department auditors to find out that he was selling things that he wasn't buying, that it was wrong, it **was against the law** and he wanted the records destroyed." (TR II 1245) (Emphasis added.)

It is fundamentally unfair and unconscionable to construe our system of justice and the United States Constitution so as to allow the Government to introduce evidence of other crimes on the part of the Defendant at both trials (not to cast aspersions upon the character of the Defendant) to prove MOTIVE when the Defendant has already been acquitted in the same court of those crimes and then hold that the Defendant's acquittal of those crimes is irrelevant and hearsay. Why is evidence regarding proof of other crimes when offered by the Government relevant to prove motive and irrelevant when the Defendant tries to prove that there was no motive? How can a verdict of conviction in any court NOT BE hearsay when offered by the Government to prove motive, and a Judgment of Acquittal by the same court conducting that same trial upon the same evidence when offered by the defense to rebutt that motive BE hearsay? The Court of Appeal's decision holds this.

A similar situation was encountered in *U.S. v. Phillips*, 401 F.2d 301 at 306 (7th Cir. 1968), but the Second Circuit Court of Appeals reached the opposite conclusion.

In the present case the result is clear. The Petitioner at both trials was denied his constitutional rights of collateral estoppel, double jeopardy, due process, confrontation and a fair and impartial jury.

IV. THE OPINIONS BELOW ALLOW A DOUBLE STANDARD TO BE APPLIED IN THE GRANTING OF CHALLENGES FOR CAUSE, THUS INCREASING THE GOVERNMENT'S PRE-EMPTORY CHALLENGES.

At the second trial, many prospective jurors had some knowledge of the prior proceedings including the granting of the Petitioner's motion for judgment of acquittal on Counts I-XV. In *voir dire*, when a prospective juror had some knowledge of the prior proceeding, (**but not** the acquittal) the Court, over the Petitioner's objection, would attempt to rehabilitate the juror by examining the juror to determine whether he or she could put aside their knowledge and serve as a fair and impartial juror. This occurred even when the prospective juror had **inaccurate** or **confused** information regarding the previous proceedings. However, when a prospective juror had accurate knowledge of the prior proceedings, (**specifically** the acquittals) the Court, on **every** occasion, granted the Government's challenge for cause and specifically refused to even ask the prospective juror whether he or she could be fair and impartial.

This Court has stated that knowledge of a case or prior proceedings is not sufficient grounds for removal of a juror from the jury panel, *Irwin v. Dowd*, 366 U.S. 787, 81 S.Ct. 1639, 6 L.Ed. 751 (1961). It is incumbent upon the trial court to inquire as to whether jurors, because of their knowledge, have formed any opinion that they could not yield to the **evidence.** While it is true that the trial judge has great discretion in the *voir dire* process, it is also true that this process must be conducted in an even-handed way; and where this discretion is abused reversal may be required. *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

The Court of Appeal's decision fails to address the central issue of Defendant's objections. The trial court did not apply the proper standards enumerated by this Court, in *Irwin v. Dowd*, (36 U.S. 787, 81 S.Ct. 1639, 6 L.Ed. 751 [1961]), to those jurors challenged for cause by the Government, while applying these standards to those challenged by the defense, to those prospective jurors with knowledge of the prior proceedings. Contrary to the Court of Appeal's rationale, the trial judge made no decisions based on "demeanor of the jurors" but stridently applied an arbitrary standard that he himself questioned. The trial court stated:

> "There is some question in my mind the fact that someone has read that for some reason charges were dismissed, that that in and of itself disqualifies them. But that's the standard I have been using and I propose to continue it, but . . . ." (TR II 126)

Particularly with regard to Jurors Meisenheimer (TR II 43), Sherwood (TR II 156), Smith (TR II 174), Terhune (TR II 177), Smith (TR II 192), Cook (TR II 204), McFerrin (TR II 234), Tripp (TR II 273), and Aydelott (TR II 285) (where the Petitioner specifically had objected to the Court's standard and asked for a mistrial) the Court failed to even inquire whether they had formed an opinion from this knowledge, much less whether they could set it aside. Conversely, the trial judge extensively questioned jurors who had unfavorable and inaccurate knowledge about the prior proceedings and who the Petitioner challenged for cause. This procedure was particularly prejudicial after Petitioner had exercised their last pre-emptory challenge.[3]

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[3] It is clear that this process impaired the right of the defense to its use of peremptory challenges to the prejudice of the defendant The defense was bound to use its last two challenges on persons with incor-

It is not surprising that the Court often "questioned its own standard" throughout the entire *voir dire* procedure. (TR II 126, 161, 182) The standard was wrong and lacked any foundation in law, which resulted in the denial of due process to Petitioner, as one-by-one, qualified jurors were dismissed at the Government's request for "cause." The Petitioner's right to a fair selection process and **full and equal** use of pre-emptory challenges requries **more** than a "questionable" standard which resulted in a "questionable" trial. As the Supreme Court in *Pointer v. United States*, 14 S.Ct. 410 (1894) points out:

> "Any system for the impanelling of a jury that prevents or embarrasses the full unrestricted exercise by the accused of that right must be condemned." *Pointer*, supra at 414.

The Trial Court's action severely impaired the Defendant's rights to fairly utilize its pre-emptory challenges and requires reversal. See *Lewis v. United States*, 146 U.S. 730, 13 S.Ct. 136, 138; 36 L.Ed. 1011 (1882); *Swain v. State of Alabama*, 380 U.S. 24, 85 S.Ct. 783 (1965).

V. THE OPINIONS BELOW FAIL TO APPLY THE INDEPENDENT EVIDENCE TEST FOR INTRODUCTION OF CO-CONSPIRATORS' STATEMENTS WHEN THE ONLY OTHER INDEPENDENT EVIDENCE NEGATED THE INTENT OF THE ONLY OTHER ALLEGED CO-CONSPIRATOR IN VIOLATION OF PETITIONER'S RIGHT TO CONFRONTATION.

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rect knowledge of the prior proceedings and charges (Tr. II-260), leaving none remaining to challenge Jurors Bell and Delk, both of whom the defense objected to for cause. Concurrently, with this, the Court excused prospective Jurors Carl Tripp (TR II 277) and Jimmy Aydelott (TR II 287) for cause on motion by the Government without any evidence of their partiality, based purely on correct knowledge of the prior proceedings.

The Court of Appeal's decision allows the Government to completely avoid the law of this circuit as provided for in *United States v. Stipe*, 653 F.2d 446 (10th Cir. 1981) as well as other Circuits (see also, *U.S. v. James*, 590 F.2d 575 [5th Cir. 1979]) and thus violated the Defendant's constitutional right to confrontation. The only alleged "independent evidence" of the alleged conspiracy between the Defendant and Carlos Marcello was portions of the tape recorded conversation between them on January 29, 1980. This was firmly established in the "James-Peterson-Stipe" pre-trial hearing (April 1, 2, 5 and 6 of 1983.

In the present case, the Court of Appeal's decision allows the tape recorded conversations between the only two alleged conspirators to serve as **the** necessary "independent evidence" to prove the existence of the conspiracy in order to introduce those same conversations. (*U.S. v. Stipe*, supra, at 448) In *Stipe* the trial court listened to the tapes sought to be introduced and **rejected** them as the "independent evidence" necessary to establish the conspiracy. Further, because it is impossible to cross-examine a tape recording, the Defendant was denied the right of confrontation of the words of Marcello on the January 29th tape. Further, the Government argued in their Court of Appeal Brief that the jury could determine the conspiratorial agreement by listening "directly to Marcello's words." The Government's position is contrary to the case precedent in all Circuits. Affirmance of this error would place the Tenth Circuit in the position of being uniquely alone in permitting a co-conspirator's non-confrontable statements to be used to establish the alleged conspiracy. The independent evidence requirement would thereafter be a nullity. This would be a quantum leap backwards, and would re-institute the

"bootstrapping evil" condemned by *James-Peterson-Stipe* and their progeny in all Circuits.[4]

This error is further aggravated by the fact that the other independent evidence available completely negated any intent on the part of Marcello to conspire to obstruct (rather than serving as the requisite independent evidence proving the conspiracy). More specifically, the Court of Appeal's decision upholds the refusal of the Defendant's Federal Rule of Criminal Procedure 29 motion for acquittal under the theory of "implied consent" of Marcello because he listened to the Defendant's statements. The Court of Appeal's opinion states at page 8:

> ". . . Defendant's own statements on tape that he wanted Marcello to prevent Lambert and Clothier from going to the F.B.I. were not hearsay. Fed. R. Evid. 801(d)(2)(A). Those statements implicitly agreeing to comply with Defendant's request constituted substantial independent evidence of a conspiracy between Defendant and Marcello." (Emphasis added.)

In the entire trial and the pre-trial hearing on the admissability of alleged co-conspirators' statements, the only proof of any affirmative thing that Marcello ever did was call his attorney in Lafayette to get information on the people Sutton was accusing of blackmailing him. Every conversation that Marcello had about Sutton out of Sutton's

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[4] The trial court did not give any instruction when the tape was introduced. The instruction given prior to deliberations makes no mention of the requirement of "independent evidence." *U.S. v. Rios*, 611 F.2d 1335 (10th Cir. 1979), The Tenth Circuit found error in the failure to properly instruct the jury and held that the reason for the instruction "was the concern that without it, declarations would bootstrap themselves and be used as proof of the existence of the conspiracy and of the Defendant's involvement in it when independent proof of these factors was a prerequisite to the use of the co-conspirator's statements." *Rios*, supra, 1340.

presence shows a scheme by Marcello to get money from Sutton for himself or Barry Mouton or had to do with taking over the B.P.M. corporation. The Government-recorded conversation occurring February 1, 1980, between Carlos Marcello and his attorney, Barry Mouton, explicitly shows Marcello's intent:

> "BARRY MOUTON: If he ain't worried about nothin' then he don't need nobody.
> "CARLOS MARCELLO: I'm tellin' ya. He, but he think that I can do this. **I ain't gonna do nothin like that.**" (Emphasis added.)

It is clear that the Government failed to prove beyond a reasonable doubt that Marcello had the necessary specific intent to conspire to obstruct justice, even at the time of the January 29, 1980 meeting with Sutton. It was incumbent upon the Government to prove beyond a reasonable doubt that **Carlos Marcello** entered into agreement with Robert Sutton where he, Carlos Marcello, had a specific intent to conspire to obstruct justice. See *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Moss*, 591 F.2d 428 (8th Cir. 1979); *United States v. Phillips*, 630 F.2d 1138 (6th Cir. 1980); *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980). A conspiracy conviction requires proof, beyond a reasonable doubt, that at least two persons conspired to commit a crime. One cannot conspire with himself. *Ronantino v. United States*, 400 F.2d 618 (10th Cir. 1968); *United States v. Peterson*, 488 F.2d (5th Cir. 1974); *United States v. Moss*, supra.

CONCLUSION

For the foregoing reasons, this Honorable Court should issue a Writ of Certiorari to review the conviction of the Petitioner in this case and, after consideration on the merit, vacate and set aside the conviction of Petitioner.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Mitchell B. Lansden, Attorney of Record for the Petitioner and a Member of the Bar of the United States Supreme Court, on application, certify that I have served by United States Mail three copies of the foregoing Petition for a Writ of Certiorari and the annexed Appendix upon the Solicitor General of the United States, first class postage prepaid, by addressing an envelope containing same to him at his official address and posting same at the United States Post Office, Main Branch, Florida Street, Baton Rouge, Louisiana, this _____ day of August, 1984.

All parties required to be served have been served.

MITCHELL B. LANSDEN
Attorney at Law

84-197 (2)

Office - Supreme Court, U.
FILED
AUG 8 1984
ALEXANDER L. STEVAS
CLERK

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT B. SUTTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 82-1841
v.	)	
	)	
ROBERT B. SUTTON,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
For the Northern District of Oklahoma
(D. C. No. 81-CR-97-E)

Mitchell B. Lansden, Baton Rouge, Louisiana (W. Rodney DeVilliers, Sr. of DeVilliers & DeVilliers, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant.

William J. Hardy, Attorney, (Frank Keating, United States Attorney, Tulsa, Oklahoma, and Richard A. Sauber, Attorney, Department of Justice, Criminal Division, Washington, D.C., with him on the brief) Department of Justice, Criminal Division, Washington, D.C., for Plaintiff-Appellee.

Before BARRETT and LOGAN, Circuit Judges, and CHILSON, District Judge*

LOGAN, Circuit Judge.

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* Honorable Hatfied Chilson, Senior United States District Judge for the District of Colorado, sitting by designation.

Defendant Robert B. Sutton appeals his conviction on one count of obstruction of justice, a violation of 18 U.S.C. § 1505, and one count of conspiracy to obstruct justice, a violation of 18 U.S.C. § 371. Those were the last two counts of a seventeen-count indictment. The first fifteen counts alleged racketeering, mail fraud, and wire fraud and were based on allegations that defendant falsely certified and sold crude oil in violation of federal regulations setting ceiling prices for various categories of crude oil. Two corporations wholly-owned by defendant, BPM, Ltd., and Scurry Oil Company, were also named in the first fifteen counts.

After the government rested its case against the defendants, the trial court found that the government had not met its burden of proof on counts one through fifteen and accordingly entered judgments of acquittal on those counts. The government sought immediate review of the trial court's order in this Court. A panel of this Court reversed that order and directed the trial court to submit all seventeen counts to the jury. *United States v. Ellison*, 684 F.2d 664 (10th Cir. 1982). This Court then heard argument en banc and reversed the panel decision. *United States v. Ellison*, 722 F.2d 595 (10th Cir. 1982). After the Supreme Court denied a stay pending resolution of the government's petitions for mandamus and certiorari, the trial resumed. The jury then found defendant guilty on count seventeen, conspiracy to obstruct justice, but could not reach a verdict on count sixteen, obstruction of justice. The trial court declared a mistrial on the obstruction of justice count, and a few weeks later defendant was retried and convicted. The trial court then sentenced defendant to five years in prison on each count, with the sentences to run concurrently, and assessed fines on each count.

The government contended that defendant obstructed justice by advising Gaylord Simon, a BPM employee, to destroy certain records that the Department of Energy (DOE)

had directed defendant, as president of BPM, to produce. Michael Bloese, formerly an auditor for the DOE, testified that he served an administrative subpoena at the office of BPM on June 30, 1978, directing defendant to produce certain records, including purchase and sales invoices, so that the DOE could conduct an audit of BPM. The subpoena was introduced into evidence. Charles Wooten, an attorney for defendant, testified that he hired an accountant, William Johnson, in July 1978 to analyze certain BPM purchase and sales invoices and that Johnson took several boxes of BPM records to his office in Lafayette, Louisiana. Dennis Briggs, an employee of one of defendant's companies and defendant's brother-in-law, testified that Simon sent him to pick up the records from Johnson and that he picked up all but one of the boxes and moved them to an ice house in Crowley, Louisiana. Briggs testified that when he told defendant that Johnson still had one box, defendant became upset. Soon after Briggs moved the boxes, vandals destroyed all the records in the ice house.

Gaylord Simon testified that another BPM employee instructed him to pick up the box of records at Johnson's house. Simon did so and then went to LaFonda's Restaurant and called defendant. Simon testified that defendant told him to destroy the records, and that defendant said he would never mention the box again. The government introduced telephone company records to corroborate Simon's testimony, showing that a call was made to the office of Paul McBride, another of defendant's attorneys, from LaFonda's. Simon testified that he disobeyed defendant's instructions and kept the box. Later he gave the box to Jack Clothier, a former business associate of defendant.

Richard Fishkin, a Justice Department lawyer, testified that Paul Wolff, another of defendant's attorneys, wrote him in January 1980 that Jack Clothier and his attorney, William Lambert, might have documents that were the subject of the

subpoena served on BPM. Ellis Blount, an FBI agent, testified that William Lambert surrendered a box of records in response to a subpoena ordering Lambert to turn over any BPM records in his possession. Blount identified a box as the one Lambert had given him. That box was admitted into evidence. Another FBI agent, David Brechwald, testified that he examined the contents of the box and found that it contained BPM invoices from late 1976 to early 1978.

To prove count seventeen, the conspiracy count, the government introduced tapes of conversations between defendant and Carlos Marcello. In addition, the government introduced evidence of unrecorded meetings between defendant and Marcello. The tapes reveal that defendant told Marcello he wanted Marcello to prevent Lambert and Clothier from talking to the FBI. The jury's guilty verdict necessarily represented a finding that Marcello agreed to defendant's request.

At the second trial the government introduced substantially the same evidence to prove obstruction of justice as at the first trial. To prove motive, the government offered testimony that defendant had bought oil for which there was a ceiling price and sold it as oil for which there was no ceiling price. The jury convicted defendant on this count at the second trial.

On appeal defendant challenges the validity of the indictment against him, argues that the trial court should have granted his motion to sever, and contends that after the trial court entered judgment on the first fifteen counts of the indictment, the government was collaterally estopped from proceeding against him on the remaining counts. Defendant also contends in regard to the first trial: (1) that the court erroneously admitted statements of Carlos Marcello; (2) that parts of tape-recorded conversations played at trial were prejudicial; (3) that the Court erred in not allow-

ing defendant to question a witness about charges pending against her; (4) that the court should not have admitted the box of records; (5) that the evidence was insufficient to support a conviction on the obstruction of justice count; (6) that the evidence was insufficient to support the conviction for conspiracy; (7) that the court should have granted a mistrial after it entered judgments of acquittal on the first fifteen counts; and (8) that the court erred in instructing the jury that there were no missing witnesses in the case.

In regard to the second trial defendant contends: (1) that the court abused its discretion in its conduct of voir dire; (2) that the court erred in not allowing defendant to inform the jury of his acquittal on the first fifteen counts of the original indictment; (3) that the court erroneously admitted testimony by Gaylord Simon's wife; (4) that the court erroneously admitted testimony by defendant's former lawyer; (5) that the court did not properly question the jurors about possible prejudicial publicity and contact with third parties; (6) that there was insufficient evidence of obstruction of justice to support the conviction; and (7) that the trial court improperly instructed the jury on the credibility of witnesses.

I

Defendant argues that the trial court should have dismissed the indictment in this case because the government failed to present to the grand jury exculpatory evidence relevant to the conspiracy count. Defendant argues that comments Marcello made during various tape-recorded conversations tended to prove that Marcello did not intend to conspire with defendant. The jury heard some of the evidence defendant claims was exculpatory but convicted him on the conspiracy count nonetheless. Even assuming that Marcello's comments were exculpatory, defendant's argument has no merit. This Court considered a similar claim in *United States v. Gutierrez*,

696 F.2d 753 (10th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1884 (1983). In that case we wrote:

> "Ordinarily . . . an indictment is not subject to challenge on the ground of incompetent evidence. *See Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). And thus, 'an indictment returned by a legally constituted and unbiased grand jury, valid on its face is sufficient to call for trial of the charge on the merits.' *United States v. Hubbard*, 603 F.2d 137, 141 (10th Cir. 1979)."

Id. at 754-55.

Defendant does not claim that the indictment in this case is facially invalid. We reject defendant's challenge to the indictment.

II

Before trial defendant moved for a severance of counts sixteen and seventeen. Because all the counts grew out of the same scheme, joinder was proper under Fed. R. Crim. P. 8(a). Defendant argued that evidence on counts sixteen and seventeen would unfairly prejudice the jury against him on the first fifteen counts. Since the trial court entered judgments of acquittal on the first fifteen counts, there was no harm to defendant on those counts. We find no abuse of discretion in the trial court's refusal to sever.

III

Defendant argues that because the trial court entered judgments of acquittal on the first fifteen counts of the original indictment, the government was estopped from proceeding against him on the remaining counts. Defendant cites *Ashe v. Swenson*, 397 U.S. 436 (1970), for the proposition that when a valid and final judgment determines an issue of ultimate fact in a criminal case, the Double Jeopardy Clause bars relitiga-

tion of that ultimate fact. The rule of *Ashe* is inapplicable here. The elements of obstruction of justice and conspiracy to obstruct justice are different from the elements of the crimes of which defendant was acquitted. Thus, defendant's acquittal on the racketeering, mail fraud, and wire fraud counts determined no issue of ultimate fact that was necessary to a conviction on either of the remaining counts.

IV

Defendant claims that the trial court improperly admitted statements of Carlos Marcello against defendant as statements by a co-conspirator in furtherance of a conspiracy because there was not substantial evidence independent of those statements to establish the existence of a conspiracy. *See United States v. Stipe*, 653 F.2d 446 (10th Cir. 1981). The trial court held a pre-trial hearing at which it correctly determined that there was substantial independent evidence of a conspiracy. Defendant's own statements on tape that he wanted Marcello to prevent Lambert and Clothier from going to the FBI were not hearsay. Fed. R. Evid. 801(d)(2)(A). Those statements and Marcello's statements implicitly agreeing to comply with defendant's request constituted substantial independent evidence of a conspiracy between defendant and Marcello. Thus, other statements by Marcello in furtherance of the conspiracy were admissible without a limiting instruction. Fed. R. Evid. 801(d)(2)(E).

V

Defendant claims that the court erred in allowing the government to play part of a tape recording of a conversation between defendant and Carlos Marcello in which defendant told Marcello that defendant's lawyer thought he was guilty and advised him to plea bargain. The conversation tended to prove motive and consciousness of guilt; evidence of both is admissible. *See United States v. Smith*, 629 F.2d 650, 652 (10th

Cir.), *cert. denied*, 449 U.S. 994 (1980); *United States v. Rowe*, 565 F.2d 635, 638 (10th Cir. 1977).

VI

Defendant claims that the trial court denied him his right to confront the witnesses against him by refusing to permit his counsel to question a witness, Jean Brown, about theft charges pending against her in Texas. Defendant argues that he needed to inquire about those charges to show bias, citing *Davis v. Alaska*, 415 U.S. 308, 317 (1974). The trial court gave defense counsel great latitude in questioning Brown about her involvement in illegal activities and about any special treatment she might expect to receive because of her testimony. Defendant asserts that Brown testified before the grand jury that she blamed defendant for the charges pending against her in Texas, and that therefore it was necessary for defense counsel to ask her about those charges specifically. In the portion of Brown's grand jury testimony that defense counsel read to the judge, Brown denied the allegations against her but did not blame Sutton for the charges. The trial court did not abuse its discretion when it disallowed questioning about the charges pending against Brown.

VII

Defendant argues that the court erred in admitting Exhibit 53, the box that William Lambert gave Agent Blount in response to a subpoena to turn over any records of BPM and several other companies in his possession. Defendant claims that the box was not properly authenticated. Fed. R. Evid. 901(a) provides:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

The government introduced Exhibit 53 simply as the box that William Lambert gave Agent Blount, and Agent Blount identified the box. The prosecution asked the jury to infer that Exhibit 53 was the same box of BPM records that Jean Brown had compiled and the same box of records that defendant had directed Gaylord Simon to destroy. The inference was a reasonable one in light of all the evidence. We find no error.

VIII

Defendant argues that the government produced insufficient evidence at the first trial to support a conviction for obstruction of justice, and that the trial court should have entered a judgment of acquittal rather than mistrial on that count. We must view the evidence and all reasonable inferences from the evidence in the light most favorable to the government. *United States v. Goldstein*, 695 F.2d 1223, 1235 (10th Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 3112 (1983). First, defendant argues that the government introduced insufficient evidence to prove, as it must under 18 U.S.C. § 1505, that a proceeding of a department or agency of the United States was pending at the time of the alleged obstruction. Michael Bloese, formerly an auditor for the United States Department of Energy, testified that he had served a subpoena on a BPM employee that directed defendant, as president of BPM, to produce certain records so that the DOE could conduct an audit of BPM. Agency investigative activities are "proceedings" within the meaning of § 1505. *United States v. Browning, Inc.*, 572 F.2d 720, 723 (10th Cir.), *cert. denied*, 439 U.S. 822 (1978). Defendant argues that there was no "proceeding" pending because the time for compliance with the subpoena had passed by the time of the alleged obstruction. We disagree. It would be absurd to conclude that someone could end a "proceeding" simply by failing to timely comply with a subpoena.

Second, defendant argues that the government did not prove that he knew about the proceeding. Again, we disagree. The jury could have reasonably inferred from the service of the subpoena at BPM's office and from the evidence of defendant's subsequent behavior that defendant knew about the DOE audit.

Third, defendant argues that there was insufficient proof that what defendant allegedly asked Simon to destroy were BPM records and thus the subject of the subpoena. Simon testified that he gave a box of records to Clothier. A letter written by one of defendant's attorneys stated that Lambert and Clothier had records sought by the BPM subpoena. This is sufficient evidence that the records defendant directed Simon to destroy were BPM records.

IX

Defendant claims that the government produced insufficient evidence of Carlos Marcello's intent to accomplish an illegal objective to support defendant's conviction for conspiracy to obstruct justice. In evaluating defendant's contention we must view the evidence in the light most favorable to the government and determine whether the evidence is sufficient to justify a verdict of guilt beyond a reasonable doubt. *United States v. Goldstein*, 695 F.2d at 1235.

When defendant told Marcello that he wanted Marcello to prevent William Lambert and Jack Clothier from talking to the FBI, Marcello implied that he agreed to do so. For example, he told defendant to give him addresses so he would not get the wrong people. When defendant offered to send someone to help Marcello, Marcello refused the offer and said, "Just give me them two and you handle your other one." Later Marcello called his lawyer to get information about Lambert and Clothier. Defendant relies on two taped conversations to argue that the evidence creates a reasonable doubt that Marcello

intended to do defendant's bidding. The jury heard the Marcello-Noland-Williams conversation and obviously did not consider it sufficiently exculpatory to create a reasonable doubt on guilt. The other, between Marcello and his lawyer, was not introduced into evidence. The excerpts from that conversation available to us are insufficient to show that Marcello was insincere when he agreed to comply with defendant's request. Viewed in the light most favorable to the government, the evidence is sufficient to support the jury's finding that Marcello intended, at least for a time, to accomplish defendant's proposed objective.

X

Defendant argues that the trial court erred in refusing to grant a mistrial on the remaining counts after the court entered judgments of acquittal on the first fifteen counts of the original indictment. Because the jurors had heard evidence relevant to the first fifteen counts, defendant argues, they could not fairly consider the remaining counts.

Although a trial court should be sensitive to the possibility of prejudice under such circumstances, *cf. Schaffer v. United States*, 362 U.S. 511, 516 (1960) (joinder of defendants rather than counts), the trial court did not abuse its discretion by refusing to grant a mistrial. The court instructed the jurors that they were to consider only the remaining two counts in the indictment. The evidence on the conspiracy count and the obstruction count was distinct from the other evidence presented, and the judge explained to the jurors what facts they must find to convict defendant on those counts.

Defendant also argues that the trial court should have granted a mistrial because the evidence became stale during the twelve days between entry of acquittal on the first fifteen counts and resumption of the trial. This is a matter of judgment, but we note that often in complex cases there are sub-

stantial lapses between the time the jury hears particular evidence and the time it commences deliberation. We hold that the trial court did not abuse its discretion in refusing to grant a mistrial after a twelve-day delay.

Finally, defendant argues that, at the very least, the trial court should have informed the jury that defendant had been acquitted on the first fifteen counts of the original indictment. The trial court instructed the jury that the first fifteen counts had been "otherwise disposed of" and that they were to consider only the remaining counts. We find no abuse of discretion.

> "A judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or of collateral estoppel. But once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted. Not only does the inference appellants suggest not flow from the judgment of acquittal . . . , but also a judgment of acquittal is hearsay. The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal."

United States v. Viserto, 596 F.2d 531, 537 (2d Cir.), *cert. denied,* 444 U.S. 841 (1979).

XI

Defendant argues that he was denied the right to confront the witnesses against him because the trial court gave a missing witness instruction but then instructed the jury that there were no missing witnesses in this case. Defendant also complains because the prosecution was allowed to tell the jury that defendant could have called any "missing witnesses" to the stand.

A trial court has discretion to give or refuse to give a missing witness instruction. *United States v. Montoya*, 676 F.2d 428, 431 (10th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 121 (1933). Before jury argument in this case the court announced that it would give a general missing witness instruction. However, the court warned defense counsel that any reference to missing witnesses would open the door for the government to explain that the defendant had subpoena power and could have called the witnesses himself. This was, in effect, a ruling that there were no missing witnesses in the case. Defense counsel did argue to the jury that the government had failed to call certain witnesses; the government responded by informing the jury that the defendant could have subpoenaed the witnesses. After jury argument the trial court agreed to append to the missing witness instruction the statement that there were no missing witnesses in this case.

The trial court did not abuse its discretion in concluding that there were no missing witnesses. The defense did not adequately show that it was solely within the government's power to physically produce the witnesses or that the witnesses' relationship with the government was such that the witnesses were effectively unavailable to the defense. *See United States v. Montoya*, 676 F.2d at 430-31; *United States v. Mahone*, 537, F.2d 922, 926-27 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976); *United States v. Blakemore*, 489 F.2d 193, 195-96 (6th Cir. 1973). Since the trial judge determined that there were no missing witnesses in this case, it would have been wiser for the trial court not to have given any missing witness instruction. But the trial court did not abuse its discretion, particularly since defense counsel referred to missing witnesses in closing argument after the court had warned that such argument would open the door to response by the government. Also, the issue of missing witnesses arose in regard to count sixteen, on which the jury hung. Thus, any error would have been harmless.

XII

Defendant's first claim in regard to the second trial is that the court abused its discretion in conducting voir dire of prospective jurors. Defendant argues that the voir dire impaired his right to exercise his peremptory challenges and denied him due process of law. He bases his claims on the court's dismissal of seventeen jurors who had substantial knowledge of previous proceedings against defendant.

At the time of voir dire the court was holding the defendant's motion for a change of venue in abeyance until it could determine the feasibility of impaneling an impartial jury. Defendant had asserted that prejudicial publicity necessitated a change of venue. Consequently, the judge was particularly sensitive to prospective jurors' knowledge of the case. The judge excused any prospective juror who demonstrated more than slight knowledge of prior proceedings in the case in an attempt to select a jury fair to both sides. Defense counsel acknowledged during voir dire that a prospective juror's knowledge can "cut both ways." One of the dismissed jurors commented. "[A]s far as I'm concerned he [defendant] is sitting over there a multi-millionaire while I'm down here losing money." Another said she knew that the defendant had previously "got off with" a number of counts. Several times defense counsel expressly agreed with the judge's decision to excuse prospective jurors with knowledge, and in many other instances defense counsel remained silent. The jurors with knowledge of the case who were not excused generally had only vague knowledge. Those with more substantial knowledge convinced the judge of their ability to be impartial.

The conduct of voir dire is within the sound discretion of the trial judge. *Ristaino v. Ross*, 424 U.S. 589, 594 (1976). "This is so because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within

the province of the trial judge.' *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)." *Ristaino v. Ross*, 424 U.S. at 594-95. The government has as much right to an impartial jury as the defendant. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). The trial court in the instant case acted reasonably in attempting to impanel an impartial jury.

XIII

Defendant argues that the trial court erred in allowing the government to introduce evidence of the crimes of which defendant was acquitted at his first trial. "Evidence of another crime, otherwise competent, is not necessarily rendered inadmissible by the fact that the accused was acquitted of such charge." *United States v. Van Cleave*, 599 F.2d 954, 957 (10th Cir. 1979). Evidence that defendant falsely certified crude oil logically tended to show defendant's motive and intent to obstruct justice.

Defendant also argues that he should have been able to introduce evidence of his acquittal on the fraud counts since the government introduced evidence of fraud.

> "Although a judgment of acquittal is relevant with respect to the issues of double jeopardy and collateral estoppel, 'once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was admitted.' *United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979)."

United States v. Kerley, 643 F.2d 299, 300 (5th Cir. 1981).

Also, as noted above, a judgment of acquittal is hearsay, and there is no exception to the hearsay rule for judgments of acquittal. *United States v. Viserto*, 596 F.2d at 537. *But cf.* Fed. R. Evid. 803(22) (excepting judgments of conviction from the hearsay rule).

XIV

Defendant contends that the trial court erred in allowing Gaylord Simon's wife to corroborate her husband's testimony that her husband made a phone call from LaFonda's Restaurant in Lafayette, Louisiana, and then told her that defendant had instructed him to destroy some records.

Under Fed. R. Evid. 801(d)(1)(B) evidence of a prior consistent statement by a witness is not hearsay if it is offered to rebut an express or implied charge against the witness of recent fabrication. The trial court must determine whether a statement is offered for that purpose. *United States v. Herring*, 582 F.2d 535, 541 (10th Cir. 1978). At trial defense counsel attempted to show that Mr. Simon was involved in a scheme to blackmail defendant with threats of turning over a box of records to law enforcement officers. On cross-examination defense counsel asked Mr. Simon, "Who was the first person you ever told that you called Bob Sutton at Paul McBride's office at noon on December 19, 1978?" The trial judge, who could see and hear defense counsel's cross-examination of Mr. Simon, reasonably concluded that defense counsel was trying to create the impression that no conversation between Mr. Simon and defendant ever took place and that Mr. Simon recently had fabricated his testimony. The trial judge instructed the jury that Mrs. Simon's statement was not admitted to prove what defendant said. The trial court properly admitted Mrs. Simon's testimony.

XV

Defendant argues that the admission of testimony by defendant's former attorney, Paul McBride, violated the attorney-client privilege. After hearing McBride's proposed testimony outside the presence of the jury, the trial judge excluded testimony about some conversations between defendant and McBride, but permitted McBride to testify that defendant had

said that he was smarter than President Nixon and that he would destroy certain records so that the government could not get them. The attorney-client privilege does not protect disclosure of plans for future illegal activity. *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *see also In re September 1975 Grand Jury Term*, 542 F.2d 734, 737 (10th Cir. 1976). McBridee's testimony was properly admitted.

XVI

During the second trial a program titled "The Oil Game" appeared on television. Defendant claims that the trial court refused his request to determine whether any jurors had seen the program. This claim is baseless. The trial judge asked the jurors whether any of them had seen a show that bore directly or indirectly on defendant's trial. None had. Defense counsel had previously stated that a general inquiry would be sufficient, and defense counsel did not object to the court's inquiry.

After the trial the trial court learned that one of the jurors had received telephone calls about defendant during the trial. The judge questioned the juror and found that the juror's maid claimed to have answered the phone several times one day during trial and heard a voice whisper, "Sutton, Sutton." The juror stated that the maid's report had not affected her deliberations. The trial court refused defense counsel's request to call the other jurors back to question them. "The district court . . . is endowed with considerable discretion in determining the scope and nature of the investigation needed to evaluate the effect of an impermissible jury contact." *United States v. Almonte*, 594 F.2d 261, 266 (1st Cir. 1979). The trial court did not abuse its discretion in refusing to call back other jurors because of this minor incident.

XVII

Defendant argues that the government produced insuffi-

cient evidence to support his conviction for obstruction of justice because Simon could not identify the box introduced into evidence as the box he picked up at Johnson's house. Simon's identification was not necessary to support a conviction. There was sufficient evidence in the second trial, as in the first trial, from which the jury could reasonably infer that the box introduced at trial was the same box Simon picked up.

XVIII

Defendant claims that the trial court erred in refusing to give defendants proposed instructions on the credibility of various witnesses. The trial court's general instructions concerning impeachment and credibility adequately explained the effect of impeachment testimony. *See Devine v. United States*, 403 F.2d 93, 95-96 (10th Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969).

AFFIRMED.

APPENDIX B

MAY TERM — JUNE 4, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Hatfield Chilson, United States District Judge*

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 82-1841
	)	
ROBERT B. SUTTON,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS, CLERK

* Of the United States District Court for the District of Colorado, sitting by designation.

APPENDIX C — PART I

EXCERPTS FROM FEBRUARY 1, 1980 CONVERSATION BETWEEN MARCELLO AND HIS ATTORNEY BARRY MOUTON

QUOTES FROM CONVERSATION BETWEEN BARRY MOUTON AND CARLOS MARCELLO DATED FEBRUARY 1, 1980, AT 8:51 A.M. to 5:14 P.M. TAKEN AT 1201 AIRLINE HIGHWAY, METAIRIE, LOUISIANA.

BARRY MOUTON: And uh . . . the only . . . that's why when I, when I read Sutton's name, I was wondering if maybe that had something . . .

CARLOS MARCELLO: Yeah, that's that . . . that . . . that's what I'm . . . **but I'm scared to fuck with him,** cause that's too dangerous to me. But look to me, **I don't wanta get implicated,** ya know what I mean?

* * *

CARLOS MARCELLO: They go . . . they had the records, all the records there. So I could give a fuck what these (inaudible). Did you ever meet Bob Sutton?

BARRY MOUTON: (Inaudible)

CARLOS MARCELLO: He's . . .

BARRY MOUTON: Fast talkin'.

CARLOS MARCELLO: Yeah, he's a fast talker, you see, I just met him three or four times and he want to fly over here today. I told him I . . . busy, man, I'll meet you in Lafayette, I figure you know . . . I'll meet you, that least I can talk, you know?

BARRY MOUTON: Uh-huh.

CARLOS MARCELLO: And uh, but he's a high powered motherfucker, he showed me a fuckin' time . . .

BARRY MOUTON: Oh, he got some juice, now.

CARLOS MARCELLO: He got, he, he showed me a financial statement for a hundred and sixty seven milion dollars. He ain't showed it to nobody, but he showed it to me. And I talked to you.

* * *

CARLOS MARCELLO: Now why, I can't get involved. If it was somebody I know, some of your friends, I say look, we'll see them people, man, they gonna get themself in trouble if they blackmail the man, you know, (inaudible), maybe we can make some money with 'em, you know? I don't know what this motherfucker, see, he don't tell me the whole story. Went in there and asked them for five million, I didn't give him no fuckin five million.

* * *

CARLOS MARCELLO: He asked me, he said do you know these guys? I said no, I don't know 'em. He said they're no good motherfuckers, they (inaudible). Said they, not (inaudible) motherfuckers, (inaudible). Me, **I ain't paid no attention.** Tell the truth, I made him put it in writin'. I'm sayin' the two names. Shit, **I don't want to get involved with no fuckin' FBI with** . . .

* * *

BARRY MOUTON: He scares me for one reason . . .

CARLOS MARCELLO: Ya understand?

BARRY MOUTON: . . . fuckin' mouth goes too much.

CARLOS MARCELLO: Yeah he go, he talk all the time.

BARRY MOUTON: All the time, all the time.

• • •

CARLOS MARCELLO: And he used to be a alcoholic, ya understand?

BARRY MOUTON: Oh, I didn't know that.

CARLOS MARCELLO: Oh, yeah. Now he drink nothin' but three iced teas. Donald drink too cause I won't let him drink when we're . . . we're drivin' so we had to take him to the plane, put him on the plane. But he's alright, he's **talkin' his ass off.** I just . . . **we just listened to him you know me,** I listen.

• • •

BARRY MOUTON: Something we can live with, you not gonna, you're not gonna make that fucker (inaudible) put some concrete shoes on 'em or something like that, I don't you know me, I don't operate like that, you don't either.

CARLOS MARCELLO: **I ain't helpin'.** Only thing could do, far as what you (inaudible), look, we got to talk to him just like we're talkin to another client. (Inaudible) What you want me to do, this . . .

• • •

CARLOS MARCELLO: Well no, you can do it that way or we'll do it, depend on what he tell you. It might mean nothin' it might be nothin' but uh, he say well, fuck, put it on a retainer fee. He claim he got some lawyers he give him eighty, eighty-five, hundred a month. You know that's talk. I figure if you can get eighty, look, if you can get five thousand a month . . .

BARRY MOUTON: Yeah, he'll get my attention.

CARLOS MARCELLO: That's what I mean.

BARRY MOUTON: He'll get my attention. But I, but I . . .

CARLOS MARCELLO: Ya see, he think (inaudible). He think that I can turn, turn anything upside-down. Now you got the whiff of it? Okay?

• • •

BARRY MOUTON: Well that's why I came, because the man come to see you . . .

CARLOS MARCELLO: He got, the guy said, I'm tellin' ya . . .

BARRY MOUTON: If he ain't worried about nothin', then he don't need nobody.

CARLOS MARCELLO: I'm tellin' ya. He, but he thinks that I can do this. **I ain't gonna do nothin' like that.** Ya understand, listen, look, somebody fuck with my wife or try to kill my kids or my brother, that's a different story. I'm gonna tell ya right now, that's a different story. It could be one of my (inaudible), it'd be a different story. I ain't gonna let 'em fuck with, with uh, for money and if he, if he might be fuckin' wrong. And you could say, man, hey, we, I try to be able to help you some way of somethin' you know. Yeah . . . You know, if it means just . . .

• • •

CARLOS MARCELLO: I'll tell you one thing. You know (inaudible) I believe, I tell ya too. **They could** (inaudible) **have a trap set for me.**

APPENDIX C — PART II

EXCERPTS FROM MARCELLO, NOLAND, WILLIAMS CONVERSATION OF FEBRUARY 1, 1980

ROBERT NOLAND: And they wanta put that deal through. But it's in B.P.M.'s name. This was, this was back eight months ago when I didn't have this idea. It's got to be in B.P.M. I can't go down there and call it NOLAN International, you know, or DICK WILLIAMS International.

DICK WILLIAMS: International.

ROBERT NOLAND: You can't.

DICK WILLIAMS: We don't have a name.

ROBERT NOLAND: You can't change names ta-to these people, they been, they been playin', you know, they been puttin' here, and B.P.M.'s doing, this and that. B.P.M. International's same company. They can accept that but you go down there and say okay, B.P.M., is no longer B.P.M., it's NOLAN International. Hey man, I can't do that. No (stutters) — nobody'll accept that. Where's your credibility, where's your — you know, where's all this. We got to have B.P.M.'s name.

DICK WILLIAMS: Financial (inaudible) his financial statement.

* * *

ROBERT NOLAND: Texas, so I'm sayin, I'm sayin' if I want control of the corporation, I don't have to have all the money, I don't have to have fifty-one percent of the money, I, I'm not gonna get in it for nothin'. But I'm leavin' his business, you know, I'm leavin', it's a matter of time, it's a matter of twenty, thirty days. And I'm gonna

— the only way I'm gonna leave him on good terms is, I can still make 'em money in international business, I don't want him askin' me well what are you doin' here, what are doin' that, cause what DICK and I are doin' is our business. And he talks to him. He can say oh DICK DICK's gonna sell oil with South Africa. He's down in Argentina. Who's he gonna tell that to, a banker? You know? We don't know. Mainly, it's none of his business. All he does is at the end of the month, or every six months, he gets his money.

CARLOS MARCELLO: That's right.

ROBERT NOLAND: This is somethin' that's gotta be had. And like you said, you gotta take it in and think about it.

CARLOS MARCELLO: I gotta take it in and like I say, I gotta get close to him than, than I am with him, you know? Cause I can't just go in to him and say look, man, why don't you listen? I can't tell him I met you. I got to see where I gotta meet you now with him. And then I'll say, well, maybe this, after talin' to BOB and DICK, man, you in trouble.

ROBERT NOLAND: See, what I'm thinkin' is maybe we can have a meeting he say okay.

CARLOS MARCELLO: Ya understand?

ROBERT NOLAND: Yeah.

CARLOS MARCELLO: Then I could say — well look —

ROBERT NOLAND: That's perfect.

CARLOS MARCELLO: BOB, BOB suggest that, I think his idea was great, man. And get out of this shit that you're

in. And pay, go ahead and pay the fine, what is ten million dollar if you're makin' - if you got a hundred and eighty million.

ROBERT NOLAND: (Inaudible)

CARLOS MARCELLO: Seven million (inaudible) me.

DICK WILLIAMS: And you get the heat off.

CARLOS MARCELLO: And look — let me tell ya. They ain't gonna let him alone now. He done open a fuckin' door.

DICK WILLIAMS: Yeah, that's right.

CARLOS MARCELLO: That twenty million ain't gonna keep —you watch, they gonna keep on him.

ROBERT NOLAND: But see, that's it, see? If you got that foreign corporation, if the D.O.E. keeps workin' (inaudible) they ain't donin' no business, it's gonna be harder for 'em. (Inaudible) you got records, well we're not doin' any business anymore. We don't have to have records. They said well we want to know.

DICK WILLIAMS: You're international.

CARLOS MARCELLO: Did you ever sit him down and talk to him?

ROBERT NOLAND: I can't do it, Carlos, because he thinks he thinks I'm playin' games. He thinks I'm tryin' to take over control.

CARLOS MARCELLO: Yeah.

ROBERT NOLAND: I am, but what I'm sayin' is maybe we can have a meeting, maybe Dick's there, you're there and

Bob's there. Nobody else. Not his son, nobody else, and we say, maybe Bennett or somethin', and we say Bob —

CARLOS MARCELLO: Realize, make him sit down and realize the real facts.

DICK WILLIAMS: Cause he's sweatin'.

CARLOS MARCELLO: And say look —

ROBERT NOLAND: Inaudible.

CARLOS MARCELLO: Why don't you —

DICK WILLIAMS: He's in a bind.

CARLOS MARCELLO: Why don't the shit you take off and let Bob (inaudible) run this thing?

ROBERT NOLAND: Well let me ask you somethin'.

CARLOS MARCELLO: Would he do that? You think he would do that?

DICK WILLIAMS: I think he would if he, if if it come from a source like you, Mr. Carlos (inaudible), respects you.

CARLOS MARCELLO: Well I know he respects me, I really believe he does, but he talks so much, I'm scared of the man, man.

ROBERT NOLAND: Well yeah but you —

CARLOS MARCELLO: He's talkin' about somethin' different altogether, makin' money now.

* * *

CARLOS MARCELLO: If you give 'em forty percent say.

ROBERT NOLAND: That's right. (Inaudible) forty-

CARLOS MARCELLO: Twenty, twenty, twenty, you know, you three are together, so you got (Inaudible) But look, this is what we told you, Bob, run the damn thing.

DICK WILLIAMS: Correct.

CARLOS MARCELLO: Cause we gonna make money or not. We either get out — or we gon-

DICK WILLIAMS: He's been after ninety thousand, he's goin' for ninety thousand barrels a day, a contract, not spots. You know, not a one-time deal for three years.

ROBERT NOLAND: Thirty-one dollars a barrel.

DICK WILLIAMS: That's a quarter of a million, a day, off right the top that we get. Right off the — I mean right off the top, a quarter of a million, easy. A sellin' by by workin' through an international deal. Every four days that's a million dollars.

ROBERT NOLAND: And you know, Dick and I got connection he don't, I don't want him knowin' who I'm dealin' with, I don't want him to know. I know people in the oil business good people, people that keep their slate clean. They wanta work with me but they don't wanta work with Bob. If I tell 'em okay, I got the same name but it ain't the same operation, he'll say okay, I wanta put some money in the deal, I wanta, I wanta send your man, whoever your man is, I wanted some of that Nigerian oil, I want some of that Equadorian oil. See, okay, you work with me. You don't talk to Mr. Sutton. He's not in control of (inaudible). So, we get more money, more investors, we we control it where he doesn't know who's investing.

• • •

ROBERT NOLAND: Well, then I'd lose the name of B.P.M. I lose that, I have to go through that whole procedure again. Dick had to go back over there.

And say, well we got, we got, we got—

DICK WILLIAMS: Another outfit.

ROBERT NOLAND: Yeah.

DICK WILLIAMS: Another company, man, forget that.

ROBERT NOLAND: Yeah and then —

DICK WILLIAMS: (Inaudible)

ROBERT NOLAND: That's right, and then they think, well, these people think yeah well —

DICK WILLIAMS: They playin' fuckin' games and —

ROBERT NOLAND: That's right.

DICK WILLIAMS: They pulled a humbug.

ROBERT NOLAND: And see like, like right now. We wrote this down. There's a refinery in uh . . .

DICK WILLIAMS: Florida, Tampa, Florida.

ROBERT NOLAND: . . . Tampa, Florida, twenty-eight thousand barrels a day. It doesn't have to, they wanta sell. All you gotta have is oil to put in it and you can pay for it in a year. Twent- it's a, it's a refinery for twenty-eight thousand barrels.

DICK WILLIAMS. But there's no products in, with Sutton's refinery.

ROBERT NOLAND: Oh yeah, better refinery, better location.

CARLOS MARCELLO: Well, how you gonna work up, how can we have a meetin' of the minds (inaudible) how, how you gonna bring it up in a few days?

ROBERT NOLAND: Okay.

CARLOS MARCELLO: It's gonna be hard to bring it up in a few days, man (inaudible).

• • •

CARLOS MARCELLO: Throw 'em off. (Inaudible) say look — Do you trust Bob? And I'll say yeah. All right you can tell me all about it. (Inaudible.) I say, well let him there. Bob will come up with some money or some — I'll, I'll work it up. It's hard for me to go runnin' to the man right now —

DICK WILLIAMS: No, no.

CARLOS MARCELLO: Say come in here tonight. I gotta see you.

ROBERT NOLAND: No.

CARLOS MARCELLO: You see right now, he's stuck. He's got the — IRS on him, he's got the deal in Tampa. He's got the deal in Lafayette, he got, he want — he want to do everything. He can't do a fuckin' thin'.

DICK WILLIAMS: Uh-huh.

CARLOS MARCELLO: He's tight. And he's all broke up like you said. If he ain't —

DICK WILLIAMS: Crazy.

CARLOS MARCELLO: Half as crazy, he gonna get crazy in the thirty days.

DICK WILLIAMS: That's right.

CARLOS MARCELLO: He — it's gonna make him crazy.

DICK WILLIAMS: In thirty days, he's —

CARLOS MARCELLO: And, and, the man, I know he had — he he had a fall one time drinkin' that right?

DICK WILLIAMS: I don't know.

CARLOS MARCELLO: Yeah, he said that in front of us.

DICK WILLIAMS: I don't know, Mr. Carlos.

CARLOS MARCELLO: So he could have fallen before — yeah he

DICK WILLIAMS: I don't recall that.

CARLOS MARCELLO: When I first met him he said man— I believe Joe Hagerman — no I think — he told me somethin'.

DICK WILLIAMS: He said that he had a drinkin' problem.

CARLOS MARCELLO: He had a drinkin' problem.

DICK WILLIAMS: And now his brother tells me he's on pill

CARLOS MARCELLO: Well, let me tell you somethin'

DICK WILLIAMS: His brother —

CARLOS MARCELLO: Let me tell you somethin'. I believe you might be right, cause I can tell a man —

ROBERT NOLAND: I had another guy tell me that.

CARLOS MARCELLO: I can tell a man, ya understand? I know what — what they're doin' and all. But that's beyond the point. Let's don't (inaudible)

ROBERT NOLAND: What I think, Carlos.

CARLOS MARCELLO: I think that — I think they gotta give me some time, I can't do it. I know what you're tryin'.

ROBERT NOLAND: No, no.

CARLOS MARCELLO: I got to work it out, you got . . .

ROBERT NOLAND: Sure.

CARLOS MARCELLO: . . . to back me up or Dick . . .

DICK WILLIAMS: Yeah.

CARLOS MARCELLO: . . . tell it to Dick and let Dick tell it to me. I can get it in Lafayette or after it comes here. But they'll come if I —

DICK WILLIAMS: If you brought it into here right now.

CARLOS MARCELLO: He'd be here tonight.

DICK WILLIAMS: That's right.

ROBERT NOLAND: Well —

CARLOS MARCELLO: And he said if you have something, he said would you call me. Give me his home number and everything — call me there, he's at the office, call me at my home anytime. Twelve o'clock, one o'clock, he'll fly down. Now that's how he talks to me.

DICK WILLIAMS: That's right.

CARLOS MARCELLO: But — what — but if you go cold turkey —

DICK WILLIAMS: No, you can't. You can't do that.

CARLOS MARCELLO: You know I'm don't — I'm not an oil man, Dick and - - -

DICK WILLIAMS: No.

CARLOS MARCELLO: . . . I ain't gonna say.

ROBERT NOLAND: But Mr. Carlos —

CARLOS MARCELLO: Only thing got is you, and that's it.

• • •

ROBERT NOLAND: It's — see — car — Mr. Carlos, this situation after you call him down here I'm not even here. You say let — let Mr. Nolan run it, you been tellin' me that he does a good job.

CARLOS MARCELLO: Oh, he been tellin' me.

ROBERT NOLAND: Okay, since they —

CARLOS MARCELLO: He told me everything about you.

ROBERT NOLAND: So he'd call me in the office, he'd say Bob, I don't know if you'll like this, he said we're gonna get out of the domestic business and we're gonna go foreign. I said — I said huh?

CARLOS MARCELLO: Yeah, I like that.

ROBERT NOLAND: Yeah, I said, Mr. Carlos thinks it's a good idea? I said I'm with him man, because he — if

he checked with his people in Washington, they say, see, first of all, you don't keep pushin, you know . . .

• • •

CARLOS MARCELLO: And say look, can can this man get out of — then I can go tell Sutton.

DICK WILLIAMS: Wait.

CARLOS MARCELLO: And say see, Sutton, I got some information I ain't gonna tell you where it come — the best thing for you to do, go do this, this, this and that there.

ROBERT NOLAND: That's right.

CARLOS MARCELLO: I say you told me you got a good man, we got Bob, we got Dick Williams. I say I trust Dick Williams with my life. Now, now you got Bob, let's put 'em both together and let 'em go on about their business. We get (inaudible) know what I mean? Or, give 'em stock or whatever you want to do. You know, you just do it the right way.

DICK WILLIAMS: Why sure, you don't wanta, you don't wanta (inaudible) a thing.

CARLOS MARCELLO: But you know what? Get your ass and got to Bahamas, stay there.

ROBERT NOLAND: Right.

CARLOS MARCELLO: Get away from here.

ROBERT NOLAND: Right.

CARLOS MARCELLO: You're out of sight, out of mind.

DICK WILLIAMS: That's exactly right.

CARLOS MARCELLO: See, he gonna stay away from there, Lafayette, he gonna stay away from (inaudible), we gonna get in serious fuckin' trouble.

ROBERT NOLAND: That's right.

CARLOS MARCELLO: You listen, I'm tellin' ya.

ROBERT NOLAND: You —

CARLOS MARCELLO: He told me with his own mouth, that he went before these lawyers, whatever they are, of the F.B.I.

ROBERT NOLAND: For the F.B.I.

CARLOS MARCELLO: He had told me the F.B.I.

DICK WILLIAMS: He told me (inaudible) man —

CARLOS MARCELLO: Hey, I'm gonna tell ya —

DICK WILLIAMS: (Inaudible).

CARLOS MARCELLO: You tell a man, and they say they black mailin' me. Told me that.

DICK WILLIAMS: For five million.

CARLOS MARCELLO: I got shook. I got shook.

DICK WILLIAMS: Remember? Five million?

CARLOS MARCELLO: I got shook, man. I said what does this bastard do? I tell ya (inaudible) I don't know what it's all about

DICK WILLIAMS: I don't know either.

CARLOS MARCELLO: And he — he (unintelligible) round and round, he say you don't know what (unintelligible) you don't know what, how to take it (unintelligible).

DICK WILLIAMS: That's right.

CARLOS MARCELLO: He's tellin' me before this (unintelligible). Well, what are you tryin' to do? If you go to the F.B.I., you tryin' to expose them there that blackmailin' you? The son of a bitch blackmailin' you? The son of a bitch blackmail me, they'll get a different story. I know how I'd take it. I'd take it different.

DICK WILLIAMS: Yes, sir:

CARLOS MARCELLO: But, look like — I don't know what they (unintelligible). How could they be blackmailin', that's what he's sayin'. I don't know.

DICK WILLIAMS: They gonna turn the records over.

CARLOS MARCELLO: Let me tell you somethin'.

ROBERT NOLAND: (unintelligible).

CARLOS MARCELLO: Let me tell you. If you blackmail me, you better know what the fuck you're doin', or you gonna end up gettin' killed or you gonna end up in jail the rest of your fuckin' life. They gotta be crazy. Either, he's crazy or these fellas gettin' him up. Or, call and tell 'em look, you don't have that —

DICK WILLIAMS: Five million.

CARLOS MARCELLO: Can't understand that. Five million is a lot of cash, man.

ROBERT NOLAND: Well, the thing about the see, if he quits his domestic operation, those those those those

(unintelligible) decrease in value about two to one. Because they're gonna try to pin him for what he's doin' now by provin' what he did in the past. If he gets out and he starts feelin' some good, it's not unusual for a company to concen'rate on foreign business. He's still got (unintelligible) refinery there, they can swap a little oil, you know, honestly. Put it in a refinery and run it. And swap a little oil, he's got his brother, he's got that (unintelligible) down there in Houston, he can do a few essential things.

CARLOS MARCELLO: We gotta think about how to get to him, TOM. Let me go take a leak.

ROBERT NOLAND: Okay, See —

CARLOS MARCELLO: I think how we gotta get —

ROBERT NOLAND: Move it?

DICK WILLIAMS: (unintelligible).

CARLOS MARCELLO: (unintelligible).

DICK WILLIAMS:

CARLOS MARCELLO: After you talk to him say look, this is how he's talkin'.

DICK WILLIAMS: Um huh.

ROBERT NOLAND: Let me tell ya. That's a good point because, if you —

CARLOS MARCELLO: You see, if I had y'all there with me, I can't talk like I want.

DICK WILLIAMS: I know that.

CARLOS MARCELLO: See, I can tell it so far, you — look —

ROBERT NOLAND: (unintelligible)

CARLOS MARCELLO: You on the fuckin' —

DICK WILLIAMS: You on the borderline.

CARLOS MARCELLO: You on the borderline and you gonna fall right in there, I'm gonna tell you right now.

DICK WILLIAMS: You try and fight 'em you gonna fall in it, cause they gonna, they (unintelligible).

CARLOS MARCELLO: What is what is your trouble? See, he never did tell me about (unintelligible). He just told me they want to plead guilty and go to jail, and this and that there. This is how he mentioned it to me. But you see, he don't never sit down and, and explain.

DICK WILLIAMS: No.

ROBERT NOLAND: Well, (unintelligible)

CARLOS MARCELLO: (unintelligible) that's he's talkin' about women, man, and this and that there. Now, you don't bullshit — just like that might. I said, who you talkin'? He said, I said you been talkin' there for two hours (unintelligible).

ROBERT NOLAND: That's right. Because (unintelligible) his wife.

CARLOS MARCELLO: He come back and say, he say, all he told me, his wife, nervous breakdown and all that bullshit, I said what you come to? Nothin'.

DICK WILLIAMS: See, I was tryin' — I was tryin' to investigate that MARTIN deal for

ROBERT NOLAND: Well, you see, I got some house deals. But the thing about it is, see I'm supposed to leave for Equador, on the seventh. And that big deal's goin' down.

CARLOS MARCELLO: Well, why don't you go ahead on down there I'll fly to (unintelligible) Sunday. And I'll have DICK with me.

ROBERT NOLAND: Yeah, what I'm thinkin is —

CARLOS MARCELLO: (Unintelligible)

ROBERT NOLAND: Is that I'll eat with DICK tonight.

CARLOS MARCELLO: Yeah. (unintelligible) back there.

ROBERT NOLAND: But see, if I'm gone, and you have this meeting, then he knows that I didn't have any part of it.

CARLOS MARCELLO: That's a good idea.

ROBERT NOLAND: If I'm in Equador, man —

CARLOS MARCELLO: That's a good idea.

ROBERT NOLAND: DICK calls me down there and let's me know, kinda where the thing . . .

CARLOS MARCELLO: Yeah . . .

ROBERT NOLAND: . . . is after a day or so, but I — I'm clean man —

CARLOS MARCELLO: That's good.

ROBERT NOLAND: I'm down there workin' hard see?

APPENDIX C — PART III

EXCERPTS FROM AGENT ZERINGUE PRETRIAL TESTIMONY RELATING TO GOVERNMENT EXHIBIT 18, INTRODUCED AT THE APRIL 1-6 PRETRIAL MOTION HEARING. THERE WAS NO TRANSCRIPT MADE OF GOVERNMENT EXHIBIT 18.

Q. Do you know there are special rules that relate, within the Department of Justice itself even, that relate to this particular statute?

A. Well, I am not familiar with the Department's rules —

Q. Probably not.

A. — but I believe that there are.

Q. Okay. But anyway this is kind of the highest level because you incorporate all of these other crimes in it, do you not?

A. Some crimes that would qualify to be used in RICO.

Q. And it carries a much stiffer penalty?

A. Yes, sir.

Q. And forfeiture?

A. Yes, sir.

Q. Now, Agent Zeringue, have you ever really listened to the Noland-Marcello tape on February 1 completely?

A. Yes, sir.

Q. All right when you listened to it — we had quite a bit of cross-examination yesterday — did you understand the relationship between the Mouton-Marcello tape about the deal and

the Marcello-Noland conversation later about him doing things for them when you first listened to those tapes or was that first brought to your attention yesterday?

A. Are you talking about the deal, the Nigerian deal?

Q. No, I am talking about Mr. Marcello talking Mr. Sutton into the offshore oil business.

A. Yes.

Q. You knew that relationship?

A. Uh-huh.

Q. You recognized that when Mr. Marcello was referring at the end of this particular tape to this guy coming to see him that he was going to give him a piece of some deal, you realized that he was talking about Bob Noland?

A. Yes, sir.

Q. You knew this then when you went to the grand jury?

A. Yes, sir.

Q. Now you played another tape the other day of February 6 between Mr. Marcello and Mr. Mouton, a telephone conversation, is that correct?

A. That is correct.

Q. Had you ever listened to that tape before?

A. I don't recall listening to that.

Q. As a matter of fact you were very surprised when you heard it, were you not?

A. Not as surprised as you seemed to be, but I had not heard it before.

Q. And utilizing that tape you had looked at the log of the conversation had you not?

A. That is correct.

Q. And nowhere on there does it appear that he talked about Mr. Mouton being his lawyer or getting a fee, did it?

A. It didn't say anything about a lawyer, no sir, about Mr. Mouton being a lawyer, no, sir.

Q. No, about him being Mr. Sutton's lawyer or becoming Mr. Sutton's lawyer?

A. No, it didn't.

Q. So you didn't realize before you played that tape that that would come out in this court, did you?

A. No.

Q. All right. Now I am going to ask a question of you, Mr. Zeringue, that I tell my students in moot court never to ask but I am going to ask you this. After listening in the context of yesterday in listening to the Noland tape, listening to this tape of Mr. Mouton at the end about maybe being his lawyer, listening to the full context of this tape today, would you not say, sir, that it was possible that Mr. Marcello was just playing along with Mr. Sutton for other reasons than to help him in his conspiracy? Not whether that's your opinion as a prosecutor, but would you not say that's possible based on these things?

A. It's a possibility.

Q. But the grand jury was never given a chance to review these, was it?

A. No, sir.

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No. 84-197

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT B. SUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in limiting the cross-examination of two prosecution witnesses regarding pending criminal charges.

2. Whether a box of company records that petitioner had ordered destroyed was properly authenticated when it was admitted into evidence.

3. Whether the district court correctly excluded evidence of petitioner's Rule 29 acquittal on other charges that were the object of his obstruction of justice.

4. Whether the district court, at petitioner's second trial, erred in excusing prospective jurors who were aware of his earlier acquittal.

5. Whether the government's evidence was sufficient to establish petitioner's participation in a conspiracy to obstruct justice.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 732 F.2d 1483.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1984. A petition for rehearing was denied on June 4, 1984 (Pet. App. 19a). The petition for a writ of certiorari was filed on August 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following jury trials in the United States District Court for the Northern District of Oklahoma, peti-

tioner was convicted on one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 371, and one count of obstructing justice, in violation of 18 U.S.C. 1505. Petitioner was sentenced to concurrent five-year terms of imprisonment and fined a total of $15,000. The court of appeals affirmed (Pet. App. 1a-18a).

Petitioner was initially charged in a 17-count indictment. Counts One through Fifteen alleged racketeering, mail fraud and wire fraud in the operation of petitioner's two wholly owned oil companies, BPM, Ltd., and Scurry Oil Company. The gist of the government's evidence was that petitioner had engaged in a lucrative scheme of buying price-controlled oil at the low price established by regulations of the Department of Energy (DOE). The oil was then resold at a higher price on the basis of false certifications that it was within the class not subject to price control under DOE regulations. Pursuant to Fed. R. Crim. P. 29, the district court granted a directed verdict of acquittal as to these counts at the close of the government's case.[1] Petitioner was convicted on Count

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[1] This ruling was appealed on an emergency basis before the jury was discharged. A panel of the court of appeals issued a writ of mandamus directing that these counts be reinstated because the circumstances, including statements made by the district court, indicated that the evidence appeared to be sufficient to go to the jury and that it would significantly advance the public interest if all 17 counts went to trial. *United States* v. *Ellison*, 684 F.2d 664 (10th Cir. 1982). The following day the en banc court reversed, however, finding that mandamus was an inappropriate remedy and that reinstating the counts would violate the Double Jeopardy Clause. *United States* v. *Ellison*, 722 F.2d 595 (10th Cir. 1982). The government filed a petition for a writ of mandamus or certiorari in this Court, but the Court denied a

Seventeen, conspiracy to obstruct justice, but the jury was unable to reach a verdict on Count 16, a substantive charge of obstruction of justice. A mistrial was declared on Count Sixteen, and at a second trial a few weeks later petitioner was convicted on the substantive obstruction of justice count.

The evidence regarding the conspiracy and obstruction counts showed the following. On June 30, 1978, a DOE auditor served an administrative subpoena on BPM, Ltd. directing it to produce certain records, including invoices for the purchase and sale of oil, so as to permit DOE to conduct an audit. Petitioner's attorney hired an accountant to analyze the invoices, and the accountant took several boxes of BPM records to his office in Lafayette, Louisiana. Gaylord Simon, a BPM employee, subsequently directed Dennis Briggs, petitioner's employee and brother-in-law, to retrieve the records from the accountant. Briggs obtained all but one of the boxes and stored them in an ice house, where they were subsequently destroyed by vandals. According to Briggs, petitioner had been upset that one of the boxes of BPM records was still in the possession of the accountant and had not been moved to the ice house. Pet. App. 3a.

Another BPM employee later directed Simon to obtain the remaining box of records from the accountant. Simon did so and then went to a restaurant, where he telephoned petitioner. Petitioner told Simon to destroy the records.[2] Simon nevertheless kept the

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stay of the trial proceedings that would have enabled it to consider those filings prior to the discharge of the jury (Pet. App. 2a).

[2] Petitioner told his attorney that he was smarter than President Nixon and that he would destroy the records so that the government could not get them (Pet. App. 17a).

box of records and later gave it to Jack Clothier, a former business associate of petitioner. In January 1980 another of petitioner's attorneys informed the Justice Department that Clothier might have documents subject to the DOE subpoena. The FBI obtained the box of records from Clothier's attorney, and it was found to contain BPM invoices from 1976, 1977, and 1978. Pet. App. 3a-4a.

The conspiracy charge against petitioner was based on his efforts to prevent Clothier and his attorney, William Lambert, from talking to the FBI. In tape recorded conversations, petitioner told Carlos Marcello that he wanted him to prevent Clothier and Lambert from talking to the FBI, and Marcello agreed to assist petitioner. Pet. App. 4a.

Petitioner appealed his convictions, raising 18 distinct claims of error. The court of appeals affirmed (Pet. App. 1a-18a).[3]

ARGUMENT

1. Petitioner contends (Pet. 14-18) that the district court denied him a fair trial by restricting the cross-examination of two prosecution witnesses. This claim is without merit.

At trial, defense counsel sought to cross-examine Jean Brown, petitioner's former employee, and Jack Clothier regarding pending criminal charges filed by the State of Texas. The district court declined to

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[3] On November 29, 1984, petitioner was indicted in the District of Columbia on the following charges: interstate transportation in aid of racketeering, in violation of 18 U.S.C. 1952; bribery, in violation of 18 U.S.C. 201; conspiracy to commit bribery, in violation of 18 U.S.C. 371; and aiding and abetting, in violation of 18 U.S.C. 2. Trial is scheduled to commence on January 24, 1985.

permit specific questioning about the state charges but allowed wide-ranging cross-examination concerning the witnesses' state of mind and any favorable treatment they might expect as a result of testifying for the government (Tr. 712, 719, 725).[4] Petitioner, citing *Davis* v. *Alaska*, 415 U.S. 308 (1974), argues that this restriction on the cross-examination of Brown and Clothier denied him his right under the Sixth Amendment to confront witnesses against him. In particular, petitioner argues that he should have been permitted to attempt to establish Brown's bias on the theory that she blamed petitioner for her criminal difficulties with the State of Texas.

The court of appeals correctly noted, however, that the district court afforded petitioner "great latitude in questioning Brown about her involvement in illegal activities and about any special treatment she might expect to receive because of her testimony" (Pet. App. 8a). This cross-examination of Brown, and also that of Clothier, provided the jury with more than sufficient information to evaluate the bias and motives of the witnesses. Under such circumstances, the Confrontation Clause is not offended by a district court's restriction on additional cross-examination to the same end. *United States* v. *Alonso*, 740 F.2d 862, 875 (11th Cir. 1984); *United States* v. *Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983).

Moreover, it is well established that the district court possesses broad discretion in controlling the cross-examination of witnesses at trial. See, *e.g.*, *United States* v. *Burke*, 738 F.2d 1225, 1228 (11th Cir. 1984). Accordingly, the court of appeals plainly

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[4] Tr. references are taken from the government's brief in the court of appeals.

was correct that the district court did not abuse its discretion here, and there is no reason for this Court to review petitioner's fact-bound claim.

2. Petitioner contends (Pet. 18-20) that the district court erred by admitting the box of BPM records into evidence without proper authentication. The court of appeals correctly rejected this claim (Pet. App. 8a-9a).

Authentication of proffered evidence is accomplished if sufficient evidence is presented to support a finding that the item in question is what its proponent claims. Rule 901(a), Fed. R. Evid. That standard was satisfied here. Contrary to petitioner's assertion (Pet. 18), the box of records introduced as Government Exhibit 53 was specifically identified by the FBI agent who inventoried the box as containing BPM crude oil invoices for 1976, 1977, and 1978 (Tr. 2915-2916). This, together with the evidence of what documents had originally been placed in the box and the testimony regarding its apparent chain of custody, was more than sufficient to support a finding that Exhibit 53 was what the prosecution claimed it to be—the box of BPM documents that petitioner had ordered destroyed.

Petitioner casts his complaint in terms of a hearsay violation that denies his right to confrontation. Plainly, there is no hearsay problem. The box of BPM records was not introduced to prove the truth of its contents—the purchase and sale prices of crude oil reflected on the BPM invoices. Rather, the box was introduced to establish that it was the item of possibly incriminating evidence that petitioner had directed Simon to destroy. As the court of appeals found (Pet. App. 9a), the evidence was more than sufficient to support that conclusion.

3. Petitioner contends (Pet. 20-22) that he should have been permitted to inform the jury that he had been acquitted on Counts One through Fifteen.[5] This contention is without merit.

The government's theory of prosecution on the obstruction charges was that petitioner was motivated to keep Clothier, Lambert, and the box of BPM invoices away from government investigators because they would provide evidence of a crime—violating DOE oil pricing regulations. Petitioner does not seriously dispute that evidence of this motive was admissible notwithstanding petitioner's Rule 29 acquittal on the underlying charge of violating DOE regulations. See *United States* v. *Gigante*, 729 F.2d 78 (2d Cir. 1984), cert. denied, No. 83-1699 (May 21, 1984). Petitioner complains, however, that he should have been permitted to rebut the force of this evidence of motive by showing that he had been acquitted of the underlying charge.

The court of appeals correctly held (Pet. App. 12a) that the judgment of acquittal was not admissible; while judgments of conviction are exempted by Rule 803(22), Fed. R. Evid., from the hearsay rule, there is no such proviso allowing the admission of a judgment of acquittal. See *United States* v. *Viserto*, 596 F.2d 531, 537 (2d Cir.), cert. denied, 444 U.S. 841 (1979). There is a sound basis for this difference in treatment. A conviction represents a judicial finding of guilt that can be made known to the jury without necessitating a collateral inquiry into the particulars of the crime or the conduct of the prior trial. An acquittal cannot be admitted without inviting just

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[5] The court informed the jury that the first 15 counts had been "otherwise disposed of" (Pet. App. 12a).

such a collateral inquiry into which precise element of the crime the government failed to establish beyond a reasonable doubt. In any event, it is well established that an acquittal is not admissible to rebut inferences that may be drawn from evidence of the underlying conduct. See *United States* v. *Kerley*, 643 F.2d 299, 300 (5th Cir. 1981); *United States* v. *Viserto*, 596 F.2d at 537.[6]

4. Petitioner contends (Pet. 23-25) that he was prejudiced at his second trial by the district court's exclusion of potential jurors who were aware of his prior acquittal. The court of appeals rejected this claim (Pet. App. 14a-15a).

The government has the right to present its case against a criminal defendant to an impartial jury. *Hayes* v. *Missouri*, 120 U.S. 68, 70 (1887). The district court possesses broad discretion in the manner and scope of the voir dire inquiry of potential jurors. Fed. R. Crim. P. 24(a); *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973); *United States* v. *Magana-Arevalo*, 639 F.2d 226, 228 (5th Cir. 1981). And the district court's decision regarding a potential juror's suitability should not be set aside unless it is manifestly erroneous. *Irvin* v. *Dowd*, 366 U.S. 717, 723-724 (1961). In this case, it is plain that the district court did not abuse its discretion in this regard.

Petitioner's basic claim is that the district court was too generous to the government in excluding po-

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[6] *United States* v. *Phillips*, 401 F.2d 301, 306 (7th Cir. 1968), cited by petitioner (Pet. 22), is not to the contrary. In that case, the court held that extrinsic offense evidence should have been excluded as unduly prejudicial. The court of appeals simply noted in passing that the fact of the defendant's acquittal on the extrinsic offense, even if revealed to the jury, would have been insufficient to cure the prejudice.

tential jurors with a possible bias in favor of petitioner due to their awareness of his earlier acquittal on the substantive fraud counts.[7] But the discharge of potential jurors with knowledge of petitioner's prior acquittal was wholly appropriate. It is true, of course, that a potential juror who, through pretrial publicity, has some knowledge of the facts of a case need not be excluded automatically. During trial the prosecution and defense will present the facts of the case and their arguments, and a juror can set aside extrajudicial sources of information and judge the case on the basis of the evidence presented at trial. *Irvin* v. *Dowd*, 366 U.S. at 723. The fact of petitioner's earlier acquittal, however, stands on a different footing from other types of pretrial publicity. It carries with it an imprimatur of judicial authority that does not exist with respect to the normal media account of a crime. Moreover, as noted above, it is a fact that was inadmissible at petitioner's trial. Thus, the district court's approach forestalled the backdoor admission of the acquittal that would have occurred if jurors were selected who had prior knowledge of the acquittal.

Moreover, as the court of appeals observed (Pet. App. 14a), knowledge of the prior acquittal, in defense counsel's words, "cut both ways." The circumstances of the Rule 29 acquittal led some to believe that it was unjust and that petitioner had gotten away with committing the crime. Thus, the decision

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[7] Petitioner does not appear to argue that biased jurors were permitted to sit on the jury. To the extent that he does, the court of appeals specifically found that the trial judge allowed no one to sit on the jury that had any knowledge of the prior proceedings unless they "convinced the judge of their ability to be impartial" (Pet. App. 14a).

to exclude all potential jurors with knowledge of the acquittal did not necessarily benefit only the prosecution. Rather, the trial court exercised sound judgment in excluding these jurors, and it cannot seriously be maintained that its decision was manifestly erroneous. See *Irvin* v. *Dowd*, 366 U.S. at 723-724. In any event, there is no suggestion that the jurors who did sit were unable to afford petitioner a fair trial, and even an erroneous exclusion of other jurors would therefore afford no basis for setting aside the results of that trial. See *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984).

5. Petitioner contends (Pet. 25-28) that the evidence was insufficient to establish that he entered into a conspiracy to obstruct justice. This contention is without merit.

Petitioner initially asserts (Pet. 26-27) that the district court erred in making its pretrial determination that a conspiracy existed and therefore that co-conspirator declarations could be admitted at trial. He argues that the district court erroneously relied upon the statement of his alleged co-conspirator, Carlos Marcello, in determining the existence of the conspiracy, which he characterizes as improper "bootstrapping." The conversation cited by petitioner is one in which he asked Marcello to assure that Lambert and Clothier did not meet with the grand jury, and Marcello agreed to be of assistance. Petitioner's statements and Marcello's response constituted the very agreement that formed their conspiracy to obstruct justice. The relevant statements on this tape were either not hearsay or within an established hearsay exception; petitioner's statements were admissions of a party (Fed. R. Evid. 801(d)(2)(A)) and Marcello's statements indicating his intent to

assist petitioner fell within the so-called "state of mind" exception (Fed. R. Evid. 803(3)). Hence, the district court's reliance on the tape recording was not "bootstrapping."[8] The tape recording in turn provided admissible and dispositive evidence of the existence of the conspiracy that provided a basis for the admission of other statements made by Marcello in furtherance of the conspiracy. See, *e.g.*, *United States* v. *DuFriend*, 691 F.2d 948, 951 (10th Cir. 1982), cert. denied, 459 U.S. 1173 (1983).

Finally, petitioner argues (Pet. 28) that the evidence, taken as a whole, was insufficient to establish that Marcello possessed the requisite intent to join a conspiracy with petitioner. This fact-bound claim was correctly rejected by the court of appeals (Pet. App. 10a-11a), and petitioner has provided no reason for this Court to review it. The jury below had in its hands an invaluable tool with which to conduct its inquiry—the tape recorded conversations of petitioner and of Marcello. See *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982). Its reasonable interpretation of those tape recordings should not lightly be set aside.

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[8] Petitioner correctly notes (Pet. 26) that the Tenth Circuit does not permit "bootstrapping" in connection with evaluating the admissibility of co-conspirator hearsay. Thus, the decision below cannot create a conflict in the circuits; even if petitioner's objections were well-founded, this case would represent no more than a misapplication of the established law of the circuit. We note that the Sixth Circuit does permit "bootstrapping," yet this Court has consistently declined to grant certiorari to review that issue. See, *e.g.*, *Means* v. *United States*, cert. denied, No. 83-6866 (Nov. 26, 1984). For the reasons stated in text, the issue is not in any event presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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